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2603
No. 12378

**United States
Court of Appeals**
For the Ninth Circuit.

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, and Its Agent Lloyd A. Mashburn; MILLWRIGHT AND MACHINERY ERECTORS, LOCAL 1607. OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L., and Its Agent Herman Barbaglia,
Appellants.

vs.

HOWARD F. LEBARON, Regional Director of the Twenty-first Region of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board,
Appellee.

Transcript of Record

**Appeal from the United States District Court
Southern District of California,
Central Division.**

FILED
JAN 4 - 1950

PAUL P. O'BRIEN

No. 12378

United States
Court of Appeals
For the Ninth Circuit.

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, and Its Agent Lloyd A. Mashburn; MILLWRIGHT AND MACHINERY ERECTORS, LOCAL 1607, OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L., and Its Agent Herman Barbaglia,

Appellants,

vs.

HOWARD F. LEBARON, Regional Director of the Twenty-first Region of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board,

Appellee.

Transcript of Record

Appeal from the United States District Court
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Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the
Southern District of California, Central Division

No. 9629-Y

HOWARD F. LEBARON, Regional Director of the
Twenty-first Region of the National Labor Re-
lations Board, for and on Behalf of the Na-
tional Labor Relations Board,

Petitioner,

vs.

LOS ANGELES BUILDING AND CONSTRU-
TION TRADES COUNCIL; and Its Agent
LLOYD A. MASHBURN; MILLWRIGHT
AND MACHINERY ERECTORS, LOCAL
1607, OF UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMER-
ICA, A.F.L.; and Its Agent HERMAN BAR-
BAGLIA,

Respondents.

PETITION FOR AN INJUNCTION UNDER
SECTION 10 (1) OF THE NATIONAL
LABOR RELATIONS ACT, AS AMENDED

To the Honorable District Judge of the United
States District Court, for the Southern District
of California, Central Division:

Comes now Howard F. LeBaron, Regional Direc-
tor of the Twenty-first Region of the National Labor
Relations Board (herein called the Board), and
petitions this Court on behalf of the Board, pur-
suant to Section 10 (1) of the National Labor Rela-

tions Act, as amended June 23, 1947 (61 Stat. 136 et seq.; 29 U.S.C. Supp. I. Sec. 141 et seq.), herein called the Act, for appropriate [2*] injunctive relief pending the final adjudication of the Board with respect to the matter pending before the Board on charges alleging that respondents have engaged in and are engaging in violations of Sections 8 (b), subsection (4)(D) of the Act. In support thereof petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Twenty-first Region of the Board, an agency of the United States Government, and files this petition for and on behalf of the Board.

2. Respondent Los Angeles Building and Construction Trades Council (herein called Council), an unincorporated association composed of eighteen (18) labor organizations engaged in the building trades industry, is a labor organization within the meaning of Section 2 (5) and 10 (1) of the Act, and is engaged within this judicial district in promoting and protecting the interests of its constituent unions and their employee members.

3. Respondent Lloyd A. Mashburn is, and at all times material herein has been, an agent of respondent Council engaged within this judicial district in promoting and protecting the interests of respondent Council's constituent unions and their employee members.

4. Respondent Millwright and Machinery Erectors, Local 1607, of the United Brotherhood of Car-

* Page numbering appearing at foot of page of Certified Transcript of Record.

penters and Joiners of America, A.F.L. (herein called Millwrights), an unincorporated association and a constituent union of respondent Council, is a labor organization within the meaning of Sections 2 (5) and 10 (1) of the Act. and is engaged within this judicial district in promoting and protecting the interests of its employee members.

5. Respondent Herman Barbaglia is, and at all times material herein has been, an agent of respondent Millwrights engaged within this judicial district in promoting and protecting the interests of respondent Millwrights' employee members.

6. Jurisdiction of this proceeding is conferred upon the Court by Section 10 (1) of the Act.

7. On or about April 15, 1949. Local Lodge 1235 of the International Association of Machinists (herein called Machinists). an independent labor organization, pursuant to the provisions of the Act filed a second amended [3] charge with the Board to a charge filed originally on February 2, 1949, and amended on March 8, 1949, said second amended charge alleging that respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b), subsection (4)(D) of the Act. Copies of said charge and amended charges are attached hereto as Exhibits 1, 2 and 3 and made a part hereof. Affidavit of service of said second amended charge is attached hereto as Exhibit 4 and made a part hereof.

8. The said charge and amended charges were referred to your petitioner as the Regional Director

for the Twenty-first Region of the Board for investigation. Petitioner has investigated the aforesaid charges.

9. After such investigation, petitioner has reasonable cause to believe that the said second amended charge is true and that a complaint of the Board based thereon should issue against the respondents pursuant to Section 10 (b) of the Act. More particularly, and upon the basis of such investigation and of the evidence disclosed as a result thereof, petitioner has reasonable cause to believe and believes that respondents have engaged in conduct in violation of Section 8 (b), subsection (4)(D) of the Act, and affecting commerce within the meaning of Section 2, subsections (6) and (7) of the Act, as follows:

(a) Southern California Edison Company (herein called Edison), a California corporation, is a public utility engaged in furnishing electrical energy and services to the Los Angeles and Southern California area. Approximately 39 per cent of its total output of electrical energy goes to instrumentalities of interstate commerce and concerns engaged in interstate commerce, such as oil refineries, rubber companies, steel plants and aircraft manufacturers. In the operation of its business, Edison during the past year purchased raw materials of a value in excess of \$3,400,000, of which approximately 66 $\frac{2}{3}$ per cent originated from outside of the State of California. During the past year approximately 25 $\frac{1}{2}$ per cent of the total power utilized

by Edison originated from outside the State of California.

(b) Stone and Webster Engineering Corporation (herein called Stone [4] and Webster), a Massachusetts corporation, is a general contractor engaged in the construction business. It is engaged mainly in industrial and commercial construction work such as the construction of steam generator plants, transmission lines, refinery work, manufacturing plants and paper mills. Its construction activities extend to every State in the United States and to many foreign countries. At the end of 1948 its construction then in progress was of an estimated completed value of one-third billion dollars. As appears in affidavit of William L. Sheets, attached hereto as Exhibit 5 and made a part hereof.

(c) Westinghouse Electric Corporation (herein called Westinghouse), a Pennsylvania corporation with its principal office at Pittsburgh, Pennsylvania, and plants throughout the United States, is engaged in the manufacture, sale and installation of electrical supplies and equipment.

In the operation of its plant located at East Pittsburgh, Pennsylvania, it manufactures electrical apparatus, including motors, switch-gear, generators, circuit breakers, lightning arresters, control apparatus and renewal parts. Westinghouse, during the past year, purchased raw materials for use in said plant of a value in excess of \$1,000,000, of which approximately 50 per cent originated from outside of the State of Pennsylvania. During the

same period Westinghouse received over \$1,000,000 from the sale of electrical apparatus manufactured at said plant of which approximately 90 per cent was sold to customers outside the State of Pennsylvania.

In the operation of its plant located at Lester, State of Pennsylvania, it manufactures steam turbines, reduction gears, steam condensers, and other auxiliary apparatus for industrial and central station plants and ship propulsion. Westinghouse, during the past year, purchased raw materials for use in said plant of a value in excess of \$1,000,000, of which approximately 50 per cent originated from outside the State of Pennsylvania. During the same period Westinghouse received over \$1,000,000 from the sale of products manufactured at said plant, approximately 50 per cent of which was sold to customers outside the State of Pennsylvania. As appears in Affidavit of William L. Budge, attached hereto as Exhibit 6 and made a part hereof.

(d) Machinists, an unincorporated association, is a labor [5] organization within the meaning of Section 2 (5) of the Act, and is engaged in promoting and protecting the interests of its employee members within this judicial district. It is an independent labor organization and is not affiliated with respondent Council.

(e) Edison is now engaged in the construction and equipment of a new steam turbine electric power generating station at Redondo Beach, California, the construction of which was begun in July, 1946,

and the estimated completed cost of which is in excess of \$38,000,000. Approximately \$18,500,000 of such cost represents the purchase value of equipment of which approximately \$12,700,000 in value has been or will be transported from outside the State of California directly to the job site. At the present time construction of the station is approximately 75 per cent completed and the units now in operation at the station furnish approximately 15 per cent of Edison's total output of electrical energy. As partly appears in Exhibit 5 attached.

(f) Stone and Webster has the general contract for the construction of the Redondo Beach station and for the past several months it has had approximately 550 of its own employees working on the project. In addition, numerous employees of various subcontractors have been engaged on the construction project. Among these employees are members of substantially all the building trades unions affiliated with respondent Council. As appears in Exhibit 5 attached.

(g) Some time prior to December, 1948, Edison entered into arrangements with Westinghouse for the latter to furnish and install several steam turbine generators at the Redondo Beach station. These turbine generators, of a total value of approximately \$4,800,000, were manufactured by Westinghouse at its plants at Lester and East Pittsburgh, Pennsylvania, from whence they were shipped to California for installation. On or about January 31, 1949, Westinghouse began the installation of one of the

turbine generators, a 6,000 kilowatt unit, pursuant to its contract with Edison. To make the installation it used, inter alia, employees who were members of the Machinists. As partly appears in Exhibit 6 attached.

(h) On or about February 2, 1949, respondents, in violation of [6] Section 8 (b) (4) (D), engaged in, and by orders, directions and instructions induced and encouraged the employees of Stone and Webster, Westinghouse and other employers on the Redondo Beach station project to engage in, a strike or concerted refusal in the course of their employment to transport or otherwise handle or work on Westinghouse products or to perform services for their employers in connection with the Redondo Beach project, an object thereof being to force or require Westinghouse and/or Stone and Webster to assign the work of installing the steam turbine generators at the Redondo Beach station to members of respondent Millwrights rather than to the employees of Westinghouse who are now members of the Machinists. As appears in Affidavits of Floyd E. Smith and Louis Merritt, attached hereto as Exhibits 7 and 8 and made a part hereof.

(i) On or about March 29, 1949, Westinghouse began the unloading of another turbine generator, a 60,000 kilowatt unit shipped from its plant at Lester, Pennsylvania to California for installation by its employees who are members of Machinists at the Redondo Beach station, using in the unloading operations riggers who are members of the Interna-

tional Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433, a constituent union of respondent Council. As partly appears in Exhibit 6 attached.

(j) On or about April 11, 1949, respondents engaged in, and by orders, directions and instructions induced and encouraged the riggers employed by Westinghouse in the above referred to unloading operations to engage in, a strike or concerted refusal in the course of their employment to transport or otherwise handle or work on Westinghouse products or to perform services for their employer in connection with the Redondo Beach project, an object thereof being to force or require Westinghouse and/or Stone and Webster to assign the work of installing the steam turbine generators at the Redondo Beach station to members of respondent Millwrights rather than to the employees of Westinghouse who now are members of the Machinists. As appears in Exhibit 6, attached.

10. For some time past a critical electrical power shortage has existed in Southern California due to the inadequate supply of water for the generation of power and the increased demand for electrical power caused by the growth of population and the expansion of industry in the area. The Redondo Beach station is planned to alleviate this shortage by providing for the generation of electric energy by steam and by increasing Edison's electric power production capacity by about 30 per cent. Of six (6) turbine generators to be installed at the Re-

dondo Beach station, only three (3), or half of them, have been placed in operation. The conduct of respondents set forth above has completely halted, since about February 2, 1949, the installation of the remaining three (3) generators.

11. It may be fairly anticipated that unless enjoined respondents will repeat and continue their course of conduct described above and engage in, and induce and encourage the employees of Stone and Webster, Westinghouse and other employers to engage in, a strike or a concerted refusal in the course of their employment to handle or work on Westinghouse products or perform services for their employers on the Redondo Beach project in order to force or require Westinghouse and/or Stone and Webster to assign the installation work on the Redondo Beach generators to members of respondent Millwrights rather than to Westinghouse's employees who are members of Machinists. Thereby irreparable injury will be done to the public interest and to the policies of the Act. To avoid such result, it is essential and appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the purpose of Section 10 (1) of the Act, that, pending final adjudication of the Board with respect to this matter, respondents, and each of them be enjoined and restrained from the commission of the acts above alleged and similar acts or repetitions thereof.

Wherefore, petitioner prays:

(1) That the Court issue a rule directing re-

spondents to appear and show cause before this Court, at a time fixed by the Court, why an injunction should not issue enjoining and restraining respondents, and each of them, their agents, servants, employees, attorneys and all parties in active concert or participation with them pending final adjudication of the Board of such matters from engaging in, or inducing or encouraging the employees of Stone and Webster, Westinghouse, or any other employers, to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport [8] or otherwise handle or work on any goods, articles or materials or commodities belonging to or utilized by Stone and Webster, Westinghouse or any other employer engaged on the construction project for Edison at Redondo Beach, California, or to perform services for Stone and Webster, Westinghouse, or any other employer on said project, where and object thereof is to force or require Westinghouse and/or Stone and Webster to assign the work of installing steam turbine generators to members of respondent Millwrights rather than to employees of Westinghouse who now are members of Machinists, or any other labor organization, unless respondent Millwrights is certified by the Board as the bargaining representative for the employees performing such work.

(2) That upon the return of the rule to show cause the Court issue an order enjoining and restraining respondents, their agents, servants, employees, attorneys and all persons in active concert

or participation with them, in the manner set forth above.

(3) That the Court grant such other and further relief as may seem just and proper.

Dated at Los Angeles, California, this 3rd day of May, 1949.

/s/ HOWARD F. LeBARON,
Regional Director, Twenty-first Region, National
Labor Relations Board.

/s/ ROBERT N. DENHAM,
General Counsel,

/s/ DAVID P. FINDLING,
Associate General Counsel,

/s/ WINTHROP A. JOHNS,
Assistant General Counsel.

/s/ CHARLES K. HACKLER,
Regional Attorney,

/s/ JEROME SMITH,
Attorney, National Labor
Relations Board. [9]

EXHIBIT No. 1

Budget Bureau No. 64-R003.1

Approval Expires Nov. 30, 1949

United States of America

National Labor Relations Board

Charge Against Labor Organization or Its Agents

Case No. 21-CD-19

Date Filed 2-2-49

Compliance Status Checked by:

Important—Read Carefully

Where a Charge Is Filed by a Labor Organization, or an Individual or Group Acting on Its Behalf, a Complaint Based Upon Such Charge Will Not Be Issued Unless the Charging Party and Any National or International Labor Organization of Which It Is an Affiliate or Constituent Unit Have Complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an Original and 4 Copies of This Charge with the NLRB Regional Director for the Region in Which the Alleged Unfair Labor Practice Occurred or Is Occurring.

1. Labor Organization or Its Agents Against
Which Charge Is Brought

Los Angeles Building and Construction Trades Council and Lloyd A. Mashburn, its Agent.

538 South Maple Avenue, Los Angeles 13, California (MI 0768)

The Above-Named Organization(s) or Its Agents

Has (Have) Engaged In and Is (Are) Engaging In Unfair Labor Practices Within the Meaning of Section (8b) Subsection(s) of the National Labor Relations Act, and These Unfair Labor Practices Are Unfair Labor Practices Affecting Commerce Within the Meaning of the Act.

2. Basis of the Charge

(Be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets)

From on or about January 15, 1949 to date, the above-named labor organization and its agent, Lloyd A. Mashburn, have induced and encouraged the employees of Stone and Webster Engineering Corporation, general contractors engaged in new construction work for the Southern California Edison Company at Redondo Beach, California, and have induced and encouraged employees of construction subcontractors working under Stone and Webster Engineering Corporation to engage in a strike and a concerted refusal in the course of their employment to perform any services for their employers, an object of such action being to force and require Westinghouse Electric Company and/or Stone and Webster Engineering Corporation to assign the work of installing such steam turbine on the premises being constructed to members of affiliates of United Brotherhood of Carpenters, Joiners and Helpers of America, A. F. of L., rather than to members of International Association of Machinists,

despite the fact that Westinghouse Electric Company has assigned such work and is carrying on said work by members of the International Association of Machinists.

Pursuant to said inducement and encouragement of employees, the above-named labor organization and its agent, Lloyd A. Mashburn, did call a strike of all of the members of labor organizations engaged in construction work at the Redondo Beach plant, which strike became effective on February 2, 1949 by the cessation of all work of a construction nature by members of such Los Angeles Building and Construction Trades Council, and was for the same purposes as set forth in the paragraph above.

3. Name of Employer

Westinghouse Electric Company and Stone and Webster Engineering Corporation

4. Location of Plant Involved

Redondo Beach, California

5. Nature of Employer's Business

Building construction and machinery installation

6. No. of Workers Employed

7. Full Name of Party Filing Charge

International Association of Machinists for Its Local Lodge 1235

8. Address of Party Filing Charge

904 Van Nuys Building, Los Angeles 14, California. Tel. No. MU 1396

9. Declaration

I Declare That I Have Read the Above Charge

and That the Statements Therein Are True to the Best of My Knowledge and Belief.

/s/ E. M. SKAGEN,

(Signature of representative
or person making charge)
Grand Lodge Representatives.

February 2, 1949

Wilfully False Statements on This Charge Can Be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80) [10]

EXHIBIT No. 2

Budget Bureau No. 64-R003.1

Approval Expires Nov. 30, 1949

United States of America

National Labor Relations Board

Charge Against Labor Organization or Its Agents

Case No. 21-CD-19

Dated Filed 3-8-49

Compliance Status Checked by:

Important—Read Carefully

Where a Charge Is Filed by a Labor Organization, or an Individual or Group Acting on Its Behalf, a Complaint Based Upon Such Charge Will Not Be Issued Unless the Charging Party and Any National or International Labor Organization of Which It Is an Affiliate or Constituent Unit Have Complied

with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an Original and 4 Copies of This Charge with the NLRB Regional Director for the Region in Which the Alleged Unfair Labor Practice Occurred or Is Occurring.

1. Labor Organization or Its Agents Against Which Charge Is Brought

Los Angeles Building and Construction Trades Council and Lloyd A. Mashburn, its Agent; and United Brotherhood of Carpenters, Joiners and Helpers of America, Local No. 1607, A. F. of L. and Herman F. Barbaglia, Its Agent.

538 South Maple Avenue, Los Angeles 13, California (MI 0768)

The Above-Named Organization(s) or Its Agents Has (Have) Engaged in and Is (Are) Engaging in Unfair Labor Practices Within the Meaning of Section (8b) Subsection(s) 4 (d) of the National Labor Relations Act, and These Unfair Labor Practices Are Unfair Labor Practices Affecting Commerce Within the Meaning of the Act.

2. Basis of the Charge

(Be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets)

First Amended Charge

From on or about January 15, 1949 to date, the above named labor organizations and their respective agents, Lloyd A. Mashburn and Herman F. Bar-

baglia, have induced and encouraged the employees of Stone and Webster Engineering Corporation, general contractors engaged in new construction work for the Southern California Edison Company at Redondo Beach, California and have induced and encouraged employees of construction subcontractors working under Stone and Webster Engineering Corporation to engage in a strike and a concerted refusal in the course of their employment to perform any services of their employers, an object of such action being;

(b) to force and require Westinghouse Electric Corporation and/or Stone and Webster Engineering Corporation to assign the machinist work of installing steam turbine generators on the premises being constructed to members of affiliates of United Brotherhood of Carpenters, Joiners and Helpers of America, A.F. of L., rather than to members of the International Association of Machinists, despite the fact that Westinghouse Electric Corporation has assigned such work and is carrying on said work by members of the International Association of Machinists.

Pursuant to said inducement and encouragement of employees, the above-named labor organizations and their respective agents, Lloyd A. Mashburn and Herman F. Barbaglia, did call a strike of all of the members of labor organizations engaged in construction work at the Redondo Beach plant, which strike became effective on February 2, 1949 by the

cessation of all work of a construction nature by members of such Los Angeles Building and Construction Trades Council, and was for the same purposes as set forth in paragraph marked (b) above.

3. Name of Employer

Westinghouse Electric Corporation and Stone and Webster Engineering Corporation

4. Location of Plan Involved

Redondo Beach, California

5. Nature of Employer's Business

Building construction and machinery installation

6. No. of Workers Employed

7. Full Name of Party Filing Charge

International Association of Machinists for its Local Lodge 1235

8. Address of Party Filing Charge

904 Van Nuys Building, Los Angeles 14, California. Tel. No. Mutual 1396

9. Declaration

I Declare That I Have Read the Above Charge and That the Statements Therein Are True to the Best of My Knowledge and Belief.

By /s/ E. M. SKAGEN,

(Signature of representative of
person making charge)

Grand Lodge Representative.

March 8, 1949

Wilfully False Statements on This Charge Can

Be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80) [12]

EXHIBIT NO. 3

Budget Bureau No. 64-R003.1

Approval Expires Nov. 30, 1949

United States of America
National Labor Relations Board

Second Amended Charge Against Labor
Organization or Its Agents

Case No. 21-CD-19

Date Filed 4-15-49.

Compliance Status Checked by: RF.

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Labor organization or its agents against which charge is brought

Name: Los Angeles Building and Construction Trades Council and Lloyd A. Mashburn, its agent; and Millwright and Machine Erector Local 1607, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL, and Herman F. Barbaglia, its Agent.

Address: 538 South Maple Avenue, Los Angeles 13, California (MI 0786).

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section (8b) subsection 4(d) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge

(Be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets.)

From on or about January 15, 1949 the above-named labor organizations and their respective agents, Lloyd A. Mashburn and Herman F. Barbaglia, have induced and encouraged the employees of Stone and Webster Engineering Corporation, general contractors engaged in constructing an electrical power plant for the Southern California Edison Company at Redondo Beach, California, the employees of construction subcontractors working

under Stone and Webster Engineering Corporation on such construction, and the employees of Westinghouse Electric Corporation to engage in a strike and a concerted refusal in the course of their employment to perform any services for their respective employers, and did engage in and call a strike of such employees, an object of such actions being to force and require Westinghouse Electric Corporation and/or Stone and Webster Engineering Corporation to assign the work of installing steam turbine generators in such power plant to members of Millwright and Machine Erector Local 1607, a labor organization affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL, rather than to members of the International Association of Machinists, another labor organization, despite the fact that Westinghouse Electric Corporation had assigned such work to members of the International Association of Machinists and was and is attempting to carry on and complete such installation work by members of the International Association of Machinists.

3. Name of Employer

Westinghouse Electric Corporation and Stone and Webster Engineering Corporation.

4. Location of Plant Involved

Redondo Beach, California.

5. Nature of Employer's Business

Building construction and machinery installation.

6. No. of Workers Employed: —.

7. Full Name of Party Filing Charge
International Association of Machinists for its
Local Lodge 1235.

8. Address of Party Filing Charge
904 Van Nuys Building, Los Angeles 14, California.
Tel. No.: Mutual 1396.

9. Declaration

I declare that I have read the above charge and that
the statements therein are true to the best of my
knowledge and belief.

By /s/ E. M. SKAGEN,

(Signature of representative
or person making charge).
Grand Lodge Representative.

April 15, 1949.

Wilfully false statements on this charge can be
punished by fine and imprisonment (U. S. Code,
Title 18, Section 80.)

EXHIBIT NO. 4

United States of America
Before The National Labor Relations Board

Case No. 21-CD-19

In the Matter of
LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL and LLOYD A. MASHBURN, its Agents, et al

and

INTERNATIONAL ASSOCIATION OF MACHINISTS for its Local Lodge 1235.

Affidavit of Service of Transmittal Letter and
Second Amended Charge.

Date of Mailing April 15, 1949.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid registered mail upon the following persons, addressed to them at the following addresses:

Los Angeles Building & Construction Trades Council, A. F. of L., 536 Maple Avenue, Los Angeles, California.

Lloyd A. Mashburn, Secretary, Los Angeles Building & Construction Trades Council, A. F. of L., 536 Maple Avenue, Los Angeles, California.

Millwright & Machine Erectors Local 1607, United Brotherhood of Carpenters and Joiners of America, A. F. of L., 106 Labor Temple, 538 Maple Avenue, Los Angeles, California.

Herman Barbaglia, Millwright & Machine Erectors Local 1607, United Brotherhood of Carpenters and Joiners of America, A. F. of L., 106 Labor Temple, 538 Maple Avenue, Los Angeles, California.

/s/ MARION C. RIEMER.

Subscribed and sworn to before me this 18th day of April, 1949.

/s/ LEE SMEDLEY,
Designated Agent,
National Labor Relations
Board.

EXHIBIT NO. 5

State of California

County of Los Angeles—ss.

Affidavit of William L. Sheets

William L. Sheets, being first duly sworn, deposes and says:

I reside at 500 South Helberta Avenue, Redondo Beach, California. I am employed by Stone and Webster Engineering Corporation as superintendent of construction on the Redondo Beach steam plant being constructed for the Southern California Edison Company. I have been employed by Stone

and Webster since 1941, having served in my present capacity since September 1, 1947. I have knowledge of the general operations of Stone and Webster and a thorough understanding of its operations in connection with the construction of the Redondo Beach steam plant.

Stone and Webster Engineering Corporation, a Massachusetts corporation, is a general contractor engaged in the construction business. It is engaged mainly in industrial and commercial construction work such as the construction of steam generator plants, transmission lines, refinery work, manufacturing plants and paper mills. Its construction activities extend to every state in the United States and to many foreign countries. At the end of 1948 its construction then in progress was of an estimated completed value of one-third billion dollars.

The Redondo Beach steam plant under construction for the Southern California Edison Company by Stone and Webster as general contractor was begun in July 1946. Its estimated completed cost is in excess of \$38,000,000. Approximately \$18,500,000 of such cost represents the purchase value of equipment, of which approximately \$12,700,000 has been or will be transported from outside the State of California directly to the jobsite. At the present time construction of the plant is approximately 75% completed.

Stone and Webster has for the past several months had approximately 550 of its own employees working on the Redondo Beach steam plant project. In

addition numerous employees of various other contractors have been engaged on the project. Among these employees are members of substantially all the building trades unions affiliated with the Los Angeles Building and Construction Trades Council.

/s/ WILLIAM L. SHEETS.

Subscribed and sworn to before me this 28th day of April, 1949.

[Seal] By /s/ J. F. ESTRIDGE,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires Oct. 27, 1951.

EXHIBIT NO. 6

Affidavit of William L. Budge

State of California

County of Los Angeles—ss.

I, William L. Budge, being first duly sworn according to law depose and say:

I reside at 3136 Eucalyptus Ave., Long Beach, California. I am employed by Westinghouse Electric Corporation, attached to its Los Angeles office, as steam service supervisor, a position I have held since January, 1946. I have been employed by Westinghouse since 1941 and have worked in both the East Pittsburgh and Lester, Pennsylvania plants of the Corporation and have full knowledge of the operations of these plants.

Westinghouse Electric Corporation, a Pennsyl-

vania corporation with its principal office at Pittsburgh, Pennsylvania and plants throughout the United States, is engaged in the manufacture, sale and installation of electrical supplies and equipment.

In the operations of its plant located at East Pittsburgh, Pennsylvania, it manufactures electrical apparatus, including motors, switchgear, generators, circuit breakers, lightning arresters, control apparatus and renewal parts. Westinghouse, during the past year, purchased raw materials for use in said plant of a value in excess of \$1,000,000, of which approximately 50% originated from outside of the State of Pennsylvania. During the same period Westinghouse received over \$1,000,000 from the sale of electrical apparatus manufactured at said plant of which approximately 90% was sold to customers outside the State of Pennsylvania.

In the operations of its plant located at Lester, State of Pennsylvania, it manufactures steam turbines, reduction gears, steam condensers and other auxiliary apparatus for industrial and central station plants and ship propulsion. Westinghouse, during the past year, purchased raw materials for use in said plant of a value in excess of \$1,000,000, of which approximately 50% originated from outside the State of Pennsylvania. During the same period Westinghouse received over \$1,000,000 from the sales of products manufactured at said plant, approximately 50% of which was sold to customers outside the State of Pennsylvania.

I am Supervisor of the installation of a 60,000 kw.

steam turbine generator at the Redondo Beach plant of the Southern California Edison Company. This steam turbine generator has been purchased by the Southern California Edison Company from the Westinghouse Electric Corporation and was manufactured in part at East Pittsburgh, Pennsylvania and in part at Lester, Pennsylvania.

On or about March 29, 1949 several railroad cars bearing parts of said steam turbine generator were spotted at Redondo. These cars carried parts of the high pressure cylinder and during the next two or three days additional cars arrived bearing parts of the low pressure cylinder, dummy rings, and miscellaneous small parts.

On or about March 30, 1949 I instructed my Field Supervisor, Mr. Scanlon, to hire iron workers, also known as riggers, to unload these cars. Thereafter to my knowledge Mr. Scanlon hired six riggers from Iron Workers Local 433 and they began to unload said equipment from the railroad cars. These iron workers continued unloading said equipment until on or about April 11, 1949.

I am informed and believe and upon information and belief aver that on or about April 11, 1949 at or about 11:30 a. m. one L. E. Johnson, Assistant Business Agent of Iron Workers Local 433, notified the job steward and the general foreman at the Redondo project of the Southern California Edison Company, in the presence of Paul D'Antone, Westinghouse Erecting and Service Engineer, that it was the wish of Local 433, its Executive Council,

and Mr. John A. Keron that all members of the Iron Workers Local withdraw from the Westinghouse job at Redondo at noon April 11, 1949. This information was transmitted by Mr. Scanlon to me.

Pursuant to this information I called Mr. John A. Keron, Business Agent of Iron Workers Local 433, and told him: "I understand there is difficulty at Redondo. Can you give me any details?"

Keron replied: "We just aren't going to work down there because we've had too much trouble on that job."

I then asked: "Can you tell me what the trouble is? I can't recall any trouble with the iron workers."

Keron replied: "If you want to know, call Mr. Leo Vie of the Building and Construction Trades Council."

I then called Mr. Vie at the office of the Building and Construction Trades Council and stated: "I understand the riggers have stopped work at Redondo. Their Business Agent told me to call you to find out why. Can you give me any information?"

Vie replied: "I certainly can. It's not our practice to work without a written contract."

I then stated: "What do you mean? A contract for this one job or a contract for this one craft?"

Vie replied: "I mean a running contract and one for all labor furnished by the Building and Construction Trades on the job."

I then asked: "Do you mean a contract like you have with the A.G.C.?"

Vie replied: "Something on that order."

I then asked: "Is that the only beef you have on the job?"

Vie replied: "Yes, that's all there is to it."

/s/ W. L. BUDGE.

Subscribed and sworn to before me this 2nd day of May 1949.

[Seal] /s/ C. E. CULVER,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires June 29, 1950.

EXHIBIT NO. 7

State of California

County of Los Angeles—ss.

Affidavit of Floyd E. Smith

Floyd E. Smith, being first duly sworn, deposes and says:

I reside at 2315 Adriatic, Long Beach, California. I am employed as business representative of the International Association of Machinists, Lodge 1235, representing the construction erection workers of the twelve southern counties of California.

On February 2, 1949, understanding that there was to be a strike or work stoppage by the Stone and Webster construction employees at Redondo Beach steam plant, I arrived on the job at approximately 8:00 A. M. along with Machinists Louis Merritt and Ralph Sinclair.

On arriving at job site I noticed several men standing at the truck gate where the Machinists entered the job site and several hundred standing at the employees gate in the parking lot. I recognized business agent Hap Rogers of Electricians Local 11; business agent Mercer of Laborers Local 802; "Charlie", business agent of Pipefitters Local 250; Barton, business agent of Carpenters Millwright Local 1607; John F. Condon, Carpenters business agent, and Leo Vie, an agent of the Building Trades Council of Los Angeles.

I talked to Mercer of the Laborers who said that it was impossible for him to put his members on the job, and that it was an action against Machinists Local 1235.

I talked to Rogers of the Electricians, who said that it was out of his hands doing anything or placing his members back on the job; that it was an action of the Building Trades.

I asked Barton of the Millwrights, what the trouble was, and he stated the Building Trades was taking a holiday. I stated that I had been in several of those type holidays, and he smiled and said, "Then you know what it is about."

On February 10, 1949, I received a telephone call from Mr. Budge, steam service supervisor for Westinghouse Electric Company, asking me to remove my members from the Redondo Beach steam plant, also stating that the Building Trades would come back to work as soon as the Machinists left. In checking on his statement I called the Laborers

and the Electricians and was notified that they had received telegrams from the Building Trades Council of Los Angeles, stating to have their members back to work the following morning. In the telephone conversations I talked to a man by the name of "Congo" of the Laborers and to Rogers of the Electricians.

I notified Merritt and Sinclair that the end of that shift on February 10, 1949, would be their last day on the job, and on the following morning, February 11, 1949, Merritt, Sinclair, and myself went to the Redondo Beach steam plant to pick up their tools. All of the construction workers appeared to be back on the job for the first time since February 2, 1949.

/s/ FLOYD E. SMITH.

Subscribed and sworn to before me this 26th day of April, 1949.

/s/ JEROME SMITH,
Attorney, NLRB.

EXHIBIT NO. 8

State of California
County of Los Angeles—ss.

Affidavit of Louis W. Merritt

Louis W. Merritt, being first duly sworn, deposes and says:

I reside at 3709 Gale Avenue, Long Beach, California. I am a member of the International Associa-

tion of Machinists. I first went to work on the Redondo Beach steam station project as an employee of Westinghouse Electric Corporation on January 31, 1949, for the purpose of assisting in the installation of a turbo-generator.

At approximately 10:00 a.m. on my first day of work, Herman Barbaglia, business agent for Local 1607 of the Millwrights, approached me on the job. Present were my co-worker, Ralph Sinclair, Charles Arney, assistant construction superintendent, and George Wofter, millwright foreman. Barbaglia first spoke to Arney, saying, "I have a disagreeable job this morning. I have to tell these men that they belong to the wrong union." Then he turned to me and said, "Can I see your card?" I told him my card was in my tool box but turned to Sinclair and asked him to show Barbaglia his card, which he did. Then Barbaglia produced his identification cards as a Millwright business agent and as a member of the Building Trades Council. He then said, "Don't start to work on the job. If you do, I will have to take job action."

At about 8:00 a.m. on the morning of February 2, 1949, Sinclair, Floyd Smith, business representative of Lodge 1235, I.A.M., and I approached to truck gate at the job site together. We saw thirty or forty men standing in groups about the truck gate, also 400 or 500 employees standing outside of the employees' gate not far off in the parking area. Among these groups I recognized many Stone and Webster construction employees. These groups of

men seemed to be gathered around several different parties whom I took by their dress to be business agents of the different organizations. Two business agents I recognized on the job were at the truck gate, one Carpenters' business agent—a tall, slender man dressed in a brown suit, the other a Mr. Barton, business agent for Millwrights Local 1507. I approached Barton and asked him what the trouble was. He was talking to two men that I recognized as an Electrician and a Millwright. He turned to me and said the Building Trades were declaring a holiday. Then he asked me, "Are you an Electrician?" I replied, "No, I am a Machinist, I. A. of M."

Through the rest of the day I saw either Mr. Barton or the Carpenters business agent at the gate at all times. In the seven work days which followed during the course of the strike, I observed either the Carpenters business agent or Barton or Barbaglia, both business agents for the Millwrights, present at the gate at all times. They appeared to be stopping and conversing with anybody who attempted to enter the gate. During the course of this period one or the other of these three business agents stopped all trucks as they attempted to enter the gate. Without exceptions, they turned around and left.

/s/ LOUIS W. MERRITT.

Subscribed and sworn to before me this 26th day of April, 1949.

/s/ JEROME SMITH,
Attorney, NLRB.

City of Los Angeles

County of Los Angeles—ss.

I, Howard F. LeBaron, being first duly sworn, on oath depose and say that I am Regional Director of the Twenty-first Region of the National Labor Relations Board, that I have read the foregoing petition and exhibits and know the contents thereof, and that the statements therein made as upon personal knowledge are true and those made as upon information and belief, I believe to be true.

/s/ HOWARD F. LeBARON.

Subscribed and sworn to before me this 3rd day of May, 1949.

[Seal] /s/ STELLA P. CERESKA,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Dec. 5, 1952.

[Endorsed]: Filed May 3, 1949.

[Title of District Court and Cause.]

RULE TO SHOW CAUSE

Upon petition of Howard F. LeBaron, Regional Director of the Twenty-First Region of the National Labor Relations Board, for an injunction enjoining and restraining Los Angeles Building and Construction Trades Council, Lloyd A. Mashburn, Millwright and Machinery Erectors, Local 1607, of United Brotherhood of Carpenters and Joiners of America, A.F.L., and Herman Barbaglia, respondents herein,

from engaging in certain acts in violation of the National Labor Relations Act, as amended, pending the final adjudication of said Board with respect to such matters, and good cause appearing therefor,

It Is Ordered that Los Angeles Building and Construction Trades Council, Lloyd A. Mashburn, Millwright and Machinery Erectors, Local 1607, of United Brotherhood of Carpenters and Joiners of America, A.F.L., and Herman Barbaglia, the respondents herein, appear before this Court at Los Angeles, California, on the 16th day of May, 1949, at 2:00 P. M., or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why, pending the final adjudication of the Board with respect to such matters, they and their agents, servants, employees, attorneys and all persons in active concert or participation with them, should not be enjoined and restrained as prayed in said petition.

It Is Further Ordered, that service of a copy of this rule, together with a copy of said petition upon which it is issued, be made by a United States Marshal upon Los Angeles Building and Construction Trades Council, Lloyd A. Mashburn, Millwright and Machinery Erectors, Local 1607, of United Brotherhood of Carpenters and Joiners of America, A.F.L., and Herman Barbaglia, in any manner provided in the Rules of Civil Procedure for the District Courts of the United States, or by registered mail; that similar service be made upon Local Lodge 1235 of the International Association of Machinists, the

charging party; and that proof of service be filed herein by the United States Marshal.

Issued at Los Angeles, California, this 3rd day of May, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed May 3, 1949.

[Title of District Court and Cause.]

RESPONDENTS' RETURN TO RULE
TO SHOW CAUSE

Come now the respondents, separately and severally, and for return to the rule to show cause heretofore issued by this court and returnable at 2:00 o'clock p.m., May 16, 1949, respondents and each of them admit, deny and allege as follows:

I.

Respondents and each of them admit that petitioner is Regional Director of the Twenty-first Region of the National Labor Relations Board. Respondents and each of them have no knowledge that petitioner brings this action on behalf of the Board or that petitioner has any lawful right to institute this petition, and therefore deny the authority of petitioner to bring or prosecute this action and request strict proof thereon.

II.

Respondents and each of them admit that respondent Los Angeles Building and Construction Trades Council is an unincorporated association composed of eighteen (18) labor organizations engaged in the building trades industry, is a labor organization within the meaning of Section 2 (5) of the Act, and is engaged within this judicial district in promoting and protecting the interests of its constituent unions and their employee members.

III.

Respondents and each of them further admit that Lloyd A. Mashburn is and at all times material herein has been an agent of respondent Los Angeles Building and Construction Trades Council, engaged within this judicial district in promoting and protecting the interests of the respondent Council's constituent unions and their employee members.

IV.

Respondents and each of them admit that Millwright and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A. F. of L., is an unincorporated association and a constituent union of respondent Council, is a labor organization within the meaning of Section 2 (5) of the Act, and is engaged within this judicial district in promoting and protecting the interests of its employee members.

V.

Respondents and each of them admit that Herman Barbaglia is and at all times material herein has been an agent of respondent Millwright and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A. F. of L., engaged within this judicial district in promoting and protecting the interests of respondent Millwrights' employee members.

VI.

Respondents and each of them deny that jurisdiction is conferred upon this court by Section 10 (1) of the Act, or any other section of the Act.

VII.

Respondents and each of them admit that on or about April 15, 1949, the International Association of Machinists on behalf of its Local Lodge 1235 filed a second amended charge with petitioner, and that the original charge was filed on February 2, 1949, with petitioner and amended on March 8, 1949, alleging that certain acts were unfair labor practices within the meaning of Section 8 (b), subsection (4) (D) of the Act, but respondents and each of them deny that such allegations amounted to unfair labor practices under Section 8 (b), subsection (4) (D) of the Act. Further respondents and each of them allege and show that at the time the International Association of Machinists on behalf of its Local Lodge 1235 filed the charges herein mentioned,

the International Association of Machinists on behalf of its Local Lodge 125 had also filed at the same time charges alleged to have arisen out of the same acts, and charged that said acts constituted further unfair labor practices within the meaning of Section 8 (b), subsection (4) (A) of the Act, and on information and belief, and believing it to be true, respondents and each of them further allege and show that petitioner investigated said charges upon the unfair labor practices alleged to be under Section 8 (b), subsection (4) (A), and that said petitioner has been unable to find that said charges have merit and that said petitioner has taken no affirmative action as required by Section 10 (1) of the Act pursuant to the said charges under Section 8 (b), subsection (4) (A), and that no action will be taken thereon by petitioner for the reason that the acts complained of do not amount to unfair labor practices within the meaning of the Labor Management Relations Act of 1947.

VIII.

Respondents and each of them have no knowledge that the charge and amended charges upon which these proceedings purportedly rest were referred to the petitioner as Regional Director of the Twenty-first Region for investigation, or that petitioner has investigated the aforesaid charges according to law, and therefore deny the allegations of Paragraph 8 of the petition completely and request strict proof thereon.

IX.

Respondents and each of them deny that petitioner has reasonable cause to believe that the second amended charge is true and that a complaint thereon should issue against respondents pursuant to Section 10 (b) of the Act. Respondents and each of them further deny and show that the alleged investigation and the alleged evidence disclosed as a result thereof was not sufficient in law or in fact to give petitioner reasonable cause to believe that respondents or any of them had engaged in conduct in violation of Section 8 (b), subsection (4) (D), or any other section of the Labor Management Relations Act of 1947.

Respondents and each of them separately and severally deny all of the material allegations contained in subparagraph (a) of Paragraph 9 of the petition.

Respondents and each of them separately and severally deny all of the material allegations contained in subparagraph (b) of Paragraph 9 of the petition.

Respondents and each of them separately and severally deny all of the material allegations contained in subparagraph (c) of Paragraph 9 of the petition.

Respondents and each of them admit that the International Association of Machinists and its Local Lodge 1235 are each unincorporated associations and are labor organizations within the mean-

ing of Section 2 (5) of the Act, and are engaged in promoting and protecting the interests of their employee members within this judicial district, and that neither of them are affiliated with respondent Los Angeles Building and Construction Trades Council.

Respondents and each of them separately and severally deny all of the material allegations contained in subparagraph (e) of Paragraph 9 of the petition.

Respondents and each of them separately and severally deny all of the material allegations contained in subparagraph (f) of Paragraph 9 of the petition.

Respondents and each of them separately and severally deny all of the material allegations contained in subparagraph (g) of Paragraph 9 of the petition.

With respect to subparagraph (h) of Paragraph 9 of the petition, Respondents and each of them deny that they or any of them in violation of Section 8 (b) (4) (D), or any other section of the Act, engaged in and by orders, directions, and instructions induced and encouraged the employees of Stone and Webster Engineering Corporation, Westinghouse Electric Corporation, and other employers at the Redondo Beach Station project mentioned in the petition to engage in a strike or a concerted refusal in the course of their employment to transport or otherwise handle or work on Westinghouse products or to perform services for their

employers in connection with the Redondo Beach Station project, an object thereof being to force or require Westinghouse and/or Stone and Webster to assign the work of installing the steam turbine generator at the Redondo Beach Station project to members of respondent Millwrights rather than to employees of Westinghouse who are now members of the Machinists. Respondents and each of them allege and show that on February 2, 1949, the members of Los Angeles Building and Construction Trades Council, including Millwright and Machinery Erectors, Local 1607, did engage in concerted activities pursuant to the guarantee in Section 7 of the Act, and engaged in a concerted protest of the illegal conduct and arrangement and the unfair labor practices being then committed jointly by the International Association of Machinists and its Local Lodge 1235 and Westinghouse Electric Corporation, and that at said time and place the International Association of Machinists and its Local Lodge 1235 and Westinghouse Electric Corporation were circumventing and seeking to circumvent the statutory prohibitions of Sections 8 (a) (1), 8 (a) (3), 8 (b) (1) and 8 (b) (2), in that International Association of Machinists and its Local Lodge 1235 and Westinghouse Electric Corporation had and were enforcing an arrangement to require certain alleged persons seeking employment with Westinghouse Electric Corporation to be hired through the International Association of Machinists and its Local Lodge 1235 and to be and remain members

of that local as a condition of employment and as a condition of continued employment at a time when neither the International Association of Machinists nor its Local Lodge 1235 had been certified by the National Labor Relations Board as being authorized to make such an arrangement or agreement, and that such arrangement or agreement constitutes unfair labor practices within the meaning of Section 8, subsections (a) (1) and (a) (3), (b) (1) and (b) (2) of the Act, as more fully appears by the exhibits attached to and made a part of the affidavit of Lloyd A. Mashburn, which in turn is attached hereto and made a part hereof.

Respondents and each of them separately and severally deny all of the material allegations contained in subparagraph (i) of Paragraph 9 of the petition.

With respect to subparagraph (j) of Paragraph 9 of the petition, respondents and each of them deny that on April 11, 1949, respondents or any of them engaged in and by orders, directions and instructions induced and encouraged the riggers employed by Westinghouse Electric Corporation at the Redondo Beach Station project aforesaid to engage in a strike or concerted refusal in the course of their employment to transport or otherwise handle or work on Westinghouse products or to perform services for their employer in connection with the Redondo Beach Station project, an object thereof being to force or require Westinghouse and/or Stone and Webster to assign the work of installing the steam

turbine generator at the Redondo Beach Station project to members of respondent Millwright and Machinery Erectors, Local 1607, rather than to employees of Westinghouse who are now members of the Machinists.

Respondents and each of them allege that on or about April 11, 1949 the riggers employed by Westinghouse withheld their services for the reason that they were attempting to obtain a collective bargaining contract for their services at Westinghouse Electric Corporation, as more fully appears by the affidavit of Mr. William L. Budge, attached to the petition herein, and for the further reason that the Los Angeles Building and Construction Trades Council and its constituent members were engaging in concerted activities pursuant to the guarantee in Section 7 of the Act and had engaged in a concerted protest of the illegal conduct and arrangement and the unfair labor practices being committed jointly by International Association of Machinists and its Local Lodge 1235 and Westinghouse Electric Corporation, and at that said time and place International Association of Machinists and its Local Lodge 1235 and Westinghouse Electric Corporation were circumventing and seeking to circumvent the statutory prohibitions of Section 8, subsections (a) (1) and (a) (3), (b) (1) and (b) (2) of the Act, and that International Association of Machinists and its Local Lodge 1235 and Westinghouse Electric Corporation had and were enforcing an arrangement or agreement to require certain persons

seeking employment by Westinghouse Electric Corporation to be hired through the International Association of Machinists or its Local Lodge 1235 and to be members and remain members of that local as a condition of employment and as a condition of continued employment at a time when neither International Association of Machinists nor its Local Lodge 1235 had been certified by the National Labor Relations Board as being authorized to make such an arrangement or agreement, and that such arrangement or agreement constituted unfair labor practices within the meaning of Section 8, subsections (a) (1), (a) (3), (b) (1) and (b) (2) of the Labor Management Relations Act of 1947, as more fully appears by the affidavit of Lloyd A. Mashburn attached hereto and made a part hereof.

X.

Respondents and each of them deny specifically and generally all of the allegations in Paragraph 10 of the petition, particularly with respect to the allegation that a critical electrical power shortage in Southern California existed.

XI.

Respondents and each of them deny that there are any grounds for anticipation and that there is no showing of any threats or evidence that conduct offensive to Section 8, subsection (b) (4) (D) has been committed or will continue, but alleges that the protestations of the unfair labor practices com-

mitted and being committed by International Association of Machinists and its Local Lodge 1235 and Westinghouse Electric Corporation, as heretofore alleged, will be made, but the form thereof is not now known or determined.

XII.

Respondents and each of them allege that the Labor Management Relations Act of 1947 does not confer jurisdiction upon the Board to hear and determine matters such as are presented by this case and hence this court has no jurisdiction to entertain these proceedings. That the "dispute" which allegedly gave rise to the filing of the charges upon which these proceedings rest arose out of a building enterprise purely local in nature and character, and not one contributing to the flow of interstate commerce. That the installation of machinery is but an incident of building and construction and is as much an integral part of the building as any of the other structural developments. That upon installation of such machinery such machinery becomes static and immovable and composes fixed parts of such structure.

XIII.

Respondents and each of them further allege and show that Section 8 (b), subsection (4) (D) of the Act is in violation of the First, Fifth and Thirteenth Amendments of the Constitution of the United States and is therefore void and of no effect

in that it denies the freedom of speech and assembly, takes property without due process of law, and compels involuntary servitude.

Wherefore, respondents and each of them pray that the rule to show cause herein be discharged and that no other order be entered in this matter.

/s/ ARTHUR GARRETT,

Attorney for Respondents.

VERIFICATION

State of California

County of Los Angeles—ss.

Lloyd A. Mashburn, being first duly sworn upon his oath, deposes and says:

That he is one of the respondents in the foregoing action, that he has read the attached return to the rule to show cause and the exhibits thereto, and knows the contents thereof, and that the statements made therein upon his personal knowledge are true, except as to those matters made upon information and belief, and as to those matters he believes them to be true.

/s/ LLOYD A. MASHBURN.

Subscribed and sworn to before me this 13th day of May, 1949.

[Seal] /s/ ELIZABETH B. DODGE,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed May 16, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF LLOYD A. MASHBURN IN
OPPOSITION TO RULE TO SHOW
CAUSE

State of California

County of Los Angeles—ss.

Lloyd A. Mashburn, being first duly sworn, deposes and says:

That he is a respondent in this action and is now and at all times mentioned in the petition herein was an officer, to-wit, Secretary-Treasurer, of respondent Los Angeles Building and Construction Trades Council, hereinafter referred to as the Council. That respondent Millwright and Machinery Erectors, Local 1607, of United Brotherhood of Carpenters and Joiners of America, A.F.L., hereinafter referred to as Local 1607, is now and was at all times [37] mentioned in the petition herein an affiliate of the Council. That both the Council and Local 1607 are labor organizations within the meaning of the National Labor Relations Act, the former being a delegate organization having district jurisdiction over the building and construction trades in Los Angeles County under the American Federation of Labor, and the latter being a membership organization composed of journeymen skilled in the execution of millwright work, that is, the setting, erection, assembling and alignment of machinery. That concurrently with the filing of the original charge herein the charging party herein filed with the petitioner herein a

charge against said respondent Council and this respondent of violation of Section 8 (b) (4) (A) of the Act, based upon the same facts as the charge and first amended and second amended charges relied upon by petitioner herein, and that the petitioner has never proceeded with said charge of violation of Section 8 (b) (4) (A), nor issued any complaint thereon, nor sought any injunctive relief thereon, nor is petitioner herein relying upon said charge, a copy of said charge being hereto attached, marked Exhibit "A," and made a part hereof.

That the dispute herein concerns wages, hours, working conditions, and representation of labor, and that the provisions of the Norris-La Guardia Act deprive this court of jurisdiction to issue any injunction herein.

That Section 10 (1) of the Act, under which petitioner proposes this court grant injunctive relief, was added to the National Labor Relations Act by the Taft-Hartley amendments of 1947 and expressly suspends the provisions of the Norris-LaGuardia Act to permit the issuance of injunctions by this court on charges of violation of Sections 8 (b) (4) (A), (B), and (C) of the Act as amended. The only language in said section 10 (1) having application to the petition herein is as follows:

"In situations where such relief is appropriate [38] the procedure specified herein shall apply to charges with respect to Section 8 (b) (4) (D)."

That said section last mentioned provides for a

hearing under Section 10 (k) of the Act on charges of violation of Section 8 (b) (4) (D) as a prerequisite to issuance by the Board of a complaint thereon. That said hearing on the charges and amended charges attached to the petition has been regularly held by the Board, and the Board's decision thereon has been duly made, filed by the Board on May 11, 1949, at Washington, D. C., and received by respondents herein on this date, and that none of these respondents are in violation thereof.

That by reason of the facts set forth in the preceding paragraph, petitioner has no cause for the relief asked in the petition or for any relief from this court, nor has petitioner nor the Board nor any Regional Director thereof ever heretofore either sought or obtained from any court injunctive relief based upon a charge of violation of Section 8 (b) (4) (D) of the Act. That no reason appears from the petition herein or otherwise why injunctive relief is appropriate herein under the provisions of Section 10 (l) of the Act quoted above.

That affiant is informed and believes and therefore alleges that petitioner has not investigated the charge and amended charges attached to the petition herein, as required by the Act, in that such investigation would provide petitioner with no reasonable cause to believe that the second amended charge or any charge relied on by petitioner is true. That petitioner has never issued any complaint against these respondents or any of them upon said second amended charge or upon any charge mentioned in the petition. That with respect to the

work of installing steam turbine generators at the Redondo Beach Station of the Southern California Edison Company, referred to in the petition, the assignment of said work to members of the Machinists union by Westinghouse was pursuant to an agreement between said Machinists and Westinghouse in violation of Sections 8 (a) (1), 8 (a) (3), 8 (b) (1) and 8 (b) (2) of the Act as amended. That the actions of respondents alleged in the petition were for the purpose of correcting said unfair labor practice and inducing the parties to said unlawful agreement to discontinue the operation thereof, and investigation of the charges referred to in the petition by petitioner as required by the Act would have revealed these facts and the lack of reasonable cause to believe that any of said charges were true.

That the illegality of said agreement which is sought to be protected and perpetuated by this petition pending final determination by the Board of some complaint not heretofore issued, although the original charge herein was filed on February 2, 1949, is alleged in charges filed with petitioner on May 9, 1949, against the Machinists and Westinghouse, copies of which are hereto attached, marked Exhibits "B" and "C," respectively, and made a part hereof.

That detailed admissions by representatives of the Machinists and Westinghouse, setting forth the unlawful conspiracy entered into between them for the purpose of making and executing said agree-

ment, are contained in an affidavit setting forth excerpts from testimony in the 10 (k) proceeding on said charges, filed concurrently herewith, and which admissions and testimony were well known to the petitioner herein at the time he filed this petition.

That the Southern California Edison Company, hereinafter referred to as Edison, is a public utility company distributing its product of electrical energy and services entirely within the State of California and the Southern California area. That the only operation of Edison involved in this matter is the construction of a building, equipped with facilities for generating electric power from gas or petroleum, which facilities constitute a local building [40] operation in replacement of a plant for the standby production of electric power from steam previously maintained by Edison for many years on the same site. That while Stone and Webster Engineering Corporation, hereinafter referred to as Stone and Webster, is in the business of general contracting, their agency in the construction of said building and facilities is solely that of agent for Edison, as is shown by the contract under which Stone and Webster is doing said work, a copy of which is hereto attached, marked Exhibit "D," and made a part hereof.

That Westinghouse Electric Corporation, hereinafter referred to as Westinghouse, is a supplier of steam turbine generating equipment for said plant, manufactured outside the State of California, but

in the erection and installation of said equipment is merely an agent of Edison, operating under the same terms and conditions as are imposed upon Stone and Webster by the contract herein set forth as Exhibit "D," as more fully appears by letters between Chadwick, Chief Engineer of Edison, and Budge, Steam Service Supervisor for Westinghouse, dated February 10th and 11th, 1949, hereto attached, marked Exhibits "E-1" and "E-2," respectively, and made a part hereof.

That the allegations in Paragraph 9 (j) of the petition concern alleged acts not set forth in any charge relied on by petitioner herein and occurring at a time when the unlawful agreement between the Machinists and Westinghouse, hereinabove set forth, was still in operation and effect. That there is not now nor has there been at any time since the filing of the original charge herein any shortage of electrical power in Southern California, as will more fully appear from the testimony of the power supervisor of Edison, set forth in another affidavit filed concurrently herewith.

That the nature of the dispute between respondents and the Machinists with respect to the work set forth in the petition [41] is one over the representation of the employees engaged in such work. That the Machinists are not in any way affiliated with or subject to the same governing body as respondents, being non-members of the American Federation of Labor, and an entirely independent labor organization which claims for itself the whole

of the work within the jurisdiction of respondents as granted by the American Federation of Labor. That it is and has been the purpose of respondents to seek to induce by such measures and by such economic pressure as are proper and lawful said employees of Westinghouse to become and remain members of respondents' organizations.

It is also our purpose to withhold support and to refrain from voluntarily supplying working men to Westinghouse for so long as Westinghouse gives effect to its unlawful agreement with the Machinists.

That the Machinists have never been certified by the Board as representatives of any employees of Westinghouse, nor have the Machinists been authorized, pursuant to Section 8 (a) (3), to enter into any agreement or arrangement whereby employees of Westinghouse as a condition of continued employment must be hired through or be members of the Machinists.

Further affiant saith not.

/s/ LLOYD A. MASHBURN.

Subscribed and sworn to before me this 13th day of May, 1949.

[Seal] /s/ ELIZABETH B. DODGE,

Notary Public in and for the County of Los Angeles, State of California. [42]

EXHIBIT A

Budget Bureau No. 64-R003.1

Approval Expires Nov. 30, 1949

United States of America

National Labor Relations Board

Charge Against Labor Organization
or Its Agents

Case No. 21-CC-53

Date Filed 2-2-49

Compliance Status Checked by:

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and 4 copies of this charge with the NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Labor organization or its agents against which charge is brought.

Los Angeles Building and Construction Trades Council and Lloyd A. Mashburn, its Agent.

538 South Maple Avenue, Los Angeles 13, California (Mi 0768).

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in

unfair labor practices within the meaning of Section (8b) Subsection(s) (1), (2), (4) (A) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the charge (be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets).

From on or about January 15, 1949, to date, the above-named labor organization and its agent, Lloyd A. Mashburn, have induced and encouraged the employees of Stone and Webster Engineering Corporation, general contractors engaged in new construction work for the Southern California Edison Company at Redondo Beach, California, and have induced and encouraged employees of construction subcontractors working under Stone and Webster Engineering Corporation to engage in a strike and a concerted refusal in the course of their employment to perform any services for their employers, an object of such action being to force and require Stone and Webster Engineering Corporation and/or Southern California Edison Company to cease doing business with the Westinghouse Electric Company, and more particularly to cease using the services of Westinghouse Electric Company employees in the installation of a certain steam turbine in connection with the construction operations mentioned above.

Pursuant to said inducement and encouragement of employees, the above-named labor organization and its agent, Lloyd A. Mashburn, did call a strike of all of the members of labor organizations engaged in construction work at the Redondo Beach plant, which strike became effective on February 2, 1949 by the cessation of all work of a construction nature by members of such Los Angeles Building and Construction Trades Council, and was for the same purposes as set forth in paragraphs above.

3. Name of employer

Westinghouse Electric Company and Stone and Webster Engineering Corporation

4. Location of plant involved

Redondo Beach, California

5. Nature of employer's business

Building construction and machinery installation

6. No. of workers employed

7. Full name of party filing charge

International Association of Machinists for its Local Lodge 1235

8. Address of party filing charge

906 Van Nuys Building, Los Angeles 14, California. Tel. No. MU 1396

9. Declaration

I declare that I have read the above charge and

that the statements therein are true to the best of my knowledge and belief.

By /s/ E. M. SKAGEN,

(Signature of representative
or person making charge).

Grand Lodge Representative.

February 2, 1949.

Wilfully false statements on this charge can be punished by fine and imprisonment (U.S. Code, Title 18, Section 80). [43]

EXHIBIT B

Budget Bureau No. 64-R003.1

Approval Expires Nov. 30, 1949

United States of America

National Labor Relations Board

Charge Against Labor Organization

or Its Agents

Case No. 21-CB-156

Date Filed 5-9-49

Compliance Status Checked by:

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and 4 copies of this charge with the NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Labor organization or its agents against which charge is brought

International Association of Machinists

211 West Seventh Street, Los Angeles, California

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section (8b) Subsection(s) (1) and (2) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the charge

(Be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets)

On or about December 1, 1947 and at various times thereafter, International Association of Machinists has restrained and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act and has caused and attempted to cause Westinghouse Electric Corporation to discriminate against employees in violation of Section 8 (2) (3) of the Act in that the International Association of Machinists has entered into an arrangement and agreement whereby Westinghouse Electric Corporation would and is employing only members of In-

ternational Association of Machinists in the placement, setting, alignment, fitting, assembling and adjustment of steam turbine generators at the Harbor Steam Plant, Long Beach, California and the Southern California Edison Company's Plant at Redondo Beach, California at a time when the National Labor Relations Board had not certified that International Association of Machinists had been authorized pursuant to Section 8 (2) (3) of the Act to make or enter into such arrangement and agreement.

3. Name of employer

Westinghouse Electric Corporation

4. Location of plant involved

600 St. Paul Ave., Los Angeles

5. Nature of employer's business

Manufacture of steam turbine generators

6. No. of workers employed

Unknown

7. Full name of party filing charge

Norval Barrett

8. Address of party filing charge

4025½ South Main, Los Angeles 37, California

9. Declaration

I declare that I have read the above charge and

that the statements therein are true to the best of my knowledge and belief.

By
(Signature of representative
or person making charge).

May 9, 1949.

Wilfully false statements on this charge can be punished by fine and imprisonment (U.S. Code, Title 18, Section 80). [45]

EXHIBIT C

Budget Bureau No. 64-R001.1

Approval Expires Nov. 30, 1949

United States of America

National Labor Relations Board

Charge Against Employer

Case No. 21-CA-448

Date Filed 5-9-49

Compliance Status Checked by:

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and 4 copies of this charge with the NLRB Regional Director for

the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer against whom charge is brought

Westinghouse Electric Corporation

600 St. Paul Avenue, Los Angeles, Calif.

No. of workers employed

Unknown

Nature of employer's business

Manufacture of steam turbine generators

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) Subsections (1) and 8 (a) (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the charge

(Be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets)

On or about December 1, 1947, and at various times thereafter, Westinghouse Electric Corporation has interfered with, restrained and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act and has and is now discriminating in regard to hire and tenure of employment and the terms and conditions of employment, in that it has entered into an arrangement and agreement with the International Association of Machinists whereby only members of the Inter-

national Association of Machinists would be and are being employed in the placement, setting, alignment, fitting, assembling and adjustment of steam turbine generators at the Harbor Steam Plant, Long Beach, California and the Southern California Edison Company's plant at Redondo Beach, California, at a time when the National Labor Relations Board had not certified that the International Association of Machinists had been authorized pursuant to Section 8 (2) (3) of the Act to make or enter into such arrangements or agreement.

3. Full name of labor organization, including local name and number, or person filing charge

Norval Barrett

4. Address

4025 1/2 South Main, Los Angeles 37, California

5. Full name of national or international labor organization of which it is an affiliate or constituent unit

6. Address of national or international

7. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By

(Signature of representative
or person filing charge).

May 9, 1949.

Wilfully false statements on this charge can be punished by fine and imprisonment (U.S. Code, Title 18, Section 80). [46]

EXHIBIT D

Stone & Webster Engineering Corporation Proposal
and Term Contract for Consulting Engineering
and Design and Construction [47]

S & W E C Form No. 1-707

January 2nd, 1948

Southern California Edison Company
Los Angeles, California

We submit the following proposal for the services of our organization (I) as Consulting Engineers, and (II) as Engineers and Constructors, as hereinafter set forth, it being understood that in providing and performing such services we will function in cooperation with and subject always to the direction and control of your Directors and/or your authorized officers and agents.

Part I. Consulting Engineering

I. Work Included

When directed by you and to the extent you desire we propose to furnish the services of our organization to act as Consulting Engineers for your Company, and render the following service:

(a) Make preliminary investigations of proposed process, engineering and construction work.

(b) Prepare estimates of cost or proposed new projects or additions and improvements to existing plant or property.

(c) Furnish general advice and assistance on construction and reconstruction work other than that for which complete engineering and construc-

tion services are to be furnished as hereinafter described:

(d) Assist in the solution of any special engineering problems that may arise in connection with the operation of your property.

(e) Make special engineering studies for improvement of plant operations and provide qualified men to instruct the local forces in the most economical operating methods for plant or process facilities.

(f) Make business studies and analyses of industrial and other situations for improvement of organization, financial conditions, manufacturing costs, sales or distribution procedure and other related [48] problems.

(g) Make shop inspections of machinery and equipment, under construction for your Company, with the use of proper materials, accurate assembly, and prompt shipment, as objectives.

(h) Make appraisals of your property and other engineering investigations relating to property value for use in rate or other proceedings in which such evidence may be necessary, and furnish expert testimony with reference thereto before courts or regulatory authorities.

II. Compensation

For the services included in this Part I of this proposal we will charge you two thirds of our regular expert or per diem rates of the members of our organization for the time during which they

are engaged on the work plus travelling and incidental expenses.

Part II. Design and Construction

I. Work Included

When directed by you, we, acting as your agent, propose to furnish the services of our organization in designing and constructing or reconstructing substantial elements of your property or additions thereto, including the following:

Steam power stations;

Water power developments;

Electrical substations;

Overhead and underground transmission lines and distributing systems;

Process plants and refining, extraction and chemical units;

Industrial plants, shops and related structures;

Gas producing plants and gas holders;

Oil and gas transmission pipe lines and pumping and compressor stations;

Dams, reservoirs, pipe lines, pumping stations and purifying systems for water supply; [49]

Railroad work and structures;

Office and other buildings.

When directed by you to do so, we will include as a part of our work the negotiation for and acquisition of land, rights-of-way, easements or other rights.

II. Service to be Rendered

When directed by you, we propose to act as your

Engineering, Purchasing and Construction Departments, working at all times in close cooperation with members of your organization, assuming as much responsibility as you may delegate to us in the direction of the work undertaken for you, and being guided in all respects by such instructions as you may from time to time give us.

All work which we undertake for you hereunder, if in any way connected with property already in operation, will be carried on in full cooperation with your operating organization, and with the least possible interference with the continuity and efficiency of the service rendered by the operated property consistent with your instructions in respect to the general conduct of the construction work. Upon completion of the work we will make available men qualified to instruct your operating personnel as to the proper methods of operation and maintenance of any new types of equipment included in such work.

To the extent you may desire, you will have full control of the work in all its phases, and of the selection and purchase of materials, machinery and equipment, the letting of such contracts as may be desirable, the wages, hours and conditions of labor, the progress and sequence of the work, and all other questions. You may order additional work, cancel work previously authorized or make any other change in either scope or character.

As Engineers, we will make all necessary engineering studies and determinations, recommend to

you the type and character of equipment and of construction required and prepare plans and specifications [50] for equipment, materials and construction work.

As Purchasing Agents, we will purchase, inspect and expedite the shipment of the necessary materials, machinery and equipment.

As Constructors, we will organize forces for the execution of the construction and the installation of the machinery and equipment, subletting parts of the work when it is to your advantage to do so, and turn the completed work over to you ready for use.

III. Orders and Contracts

All orders and contracts placed by us, and other obligations, except payrolls, shall be in your name "By Stone & Webster Engineering Corporation, Agent," and we assume no pecuniary liability under or by reason of such obligations.

IV. Disbursements

We will make all payments for materials, equipment, payrolls, services, etc., for your account from funds to be advanced to us by you for the purpose, rendering you each month a detailed statement of receipts and expenditures, supported by proper vouchers.

V. Insurance

We will place insurance to cover your liability and our own to employees engaged on this work, in accordance with Workmen's Compensation Laws of the State wherein the work is to be undertaken;

and to the public, with limits, unless otherwise requested by you, of \$50,000 for bodily injury to or the death of any one person and \$100,000 for any one accident in which more than one person is involved.

If you so request, we will place insurance covering damage to property of others arising out of or resulting from the performance of the work or covering damage to the work by fire, flood, tornado, earthquake and/or otherwise.

VI. Audit

Our correspondence, records, vouchers and books of account, in so far as they pertain to the work done or disbursements made for [51] your account under this agreement, will be always open to your inspection and audit.

VII. Progress Reports

We will render you monthly reports showing receipts and disbursements, the progress of the work in its various parts, and any changes that it may seem advisable to make in the estimates of cost or of time required for completion.

VIII. Compensation

For the services provided for in this Part II of this proposal and to include our administrative and incidental costs and our profit, we will charge you a fee based on the character and cost of the work done. For the purpose of determining the fee in any particular case, the classification of such work,

considered as a whole, shall be established as follows:

Class A—Work involving a relatively large amount of engineering, and a relatively large amount of service from the Purchasing, Construction and other departments of our Headquarters and District Offices. This Class includes steam power station projects, water power developments, substations, transmission lines, underground distributing systems, refining and process plants, pulp and paper mills, chemical, industrial and heavy manufacturing plants, gas generating plants, reservoirs, pumping stations and purifying systems for water supply and work of a similar character.

When a process or other special project involves a high ratio of engineering to the "Cost of the Work" as defined in Section X, the twice salary basis outlined in paragraph (d) of Section X and the fee schedule for Class C work in this Section VIII shall apply.

Class B—Work involving relatively less engineering, and a relatively less amount of service from the Purchasing, Construction and other departments of our Headquarters and District Offices. [52] This Class includes shops, warehouses and factory, educational, hospital and office buildings, overhead distributing systems, gas holders, pipe lines and work of a similar character.

Class C—Construction only of any work enumerated in Classes A and B, and work involving rela-

tively little designing such as railroad work, excavation, grading, paving or work of a similar character.

The fee charged for these three classes of work will be the percentage of the "Cost of the Work" as defined in Section X below, indicated in the following schedule which gives consideration to the intent that we will do for you such of the above work as in your interest can be executed most advantageously by our organization.

Cost of Work exclusive of fee	Fee in per cent of "Cost of the Work"		
	Class A	Class B	Class C
\$500,000 and less.....	9 $\frac{3}{4}$	8 $\frac{1}{4}$	6 $\frac{1}{4}$
\$500,000 to \$1,000,000.....	8 $\frac{3}{4}$	7 $\frac{3}{4}$	5 $\frac{3}{4}$
\$1,000,000 to \$2,000,000.....	8 $\frac{1}{4}$	7 $\frac{1}{4}$	5 $\frac{1}{4}$
\$2,000,000 to \$3,000,000.....	7 $\frac{3}{4}$	6 $\frac{3}{4}$	4 $\frac{3}{4}$
\$3,000,000 to \$5,000,000.....	7 $\frac{1}{4}$	6 $\frac{1}{4}$	4 $\frac{1}{4}$
\$5,000,000 to \$10,000,000.....	6 $\frac{3}{4}$	5 $\frac{3}{4}$	3 $\frac{3}{4}$
\$10,000,000 to \$15,000,000.....	6 $\frac{1}{4}$	5 $\frac{1}{4}$	3 $\frac{1}{4}$
Over \$15,000,000.....	5 $\frac{3}{4}$	4 $\frac{3}{4}$	3

When two or more projects are authorized and carried on simultaneously at or in the same general locality and require only a single administrative field force, the per cent of fee for each will be based on the total cost of such two or more projects.

Payments in accordance with the above schedule of fees shall be made monthly on Class C work, based upon the detailed statements of expenditures referred to in Section IV above. On work falling in Classes A and B, to cover our administrative and incidental costs on the initial engineering and design, a part of the fee shall be paid us in fixed monthly installments to be mutually agreed upon,

further payments being made monthly by applying the percentage fee for the work to total expenditures and deducting previous payments.

In case of termination under Section XI below, we shall be entitled [53] to retain all compensation previously paid to us hereunder, and in addition, in the event the specified percentage on expenditures, accounts due and payable, outstanding obligations and uncompleted contracts and orders as of the date of such termination is in excess of the compensation so previously paid to us, we shall be paid the amount of such excess.

IX. Administrative and Incidental Costs

The fee above specified includes the following:

(a) The service of the Executive Officers of the Corporation in our Headquarters and District Offices who will direct the work to be performed under this agreement.

(b) The service of a Construction Manager and the construction staff in our headquarters and District Offices in the organization of the working forces and the selection and assignment of superintendents and other members of the field force. The Construction Manager assigned to the work will keep in close touch with it at all times and make periodical visits to the site.

(c) The service of the General Purchasing Agent and the purchasing staff in our Headquarters and District Offices to direct and assist in the purchase of materials and equipment.

(d) The service of the Treasurer, Assistant Treasurers, Auditor and the accounting and auditing staffs in our Headquarters and District Offices to direct the accounting and office work of the field office and verify all accounts, vouchers and reports.

(e) The service of the Insurance Manager and his staff in our Headquarters Offices in connection with all insurance coverages.

(f) All other expense of our Headquarters and District Offices, except such items as are included in the "Cost of the Work" under Section X.

X. Cost of the Work

You shall pay the "Cost of the Work" which shall include [54] the following items whether commitments or expenditures are made by you direct or by us for your account:

(a) All materials, equipment, labor, and contracts covering these items, including the market value of materials and equipment that may be supplied by you.

(b) The cost of land, rights-of-way, easements or other rights when negotiated for or acquired by us for your account.

(c) The rental of any equipment hired and the cost of tools and construction equipment purchased, less the salvage on any that may be sold.

(d) Salaries of employees in our Engineering, Drafting, Estimating and Inspection-Expediting Departments for the time they are engaged on your work, except in case of authorizations for work on

the basis of the fee schedule for Class C under Section VIII when services of personnel from these departments, if required, will be included at salaries plus an equal amount for overhead expenses.

(e) A field office and its equipment and maintenance; the salaries of a Superintendent of Construction, an Accountant, a Purchasing Agent, and such assistants as they may require.

(f) The amount of any contributions required by law and/or taxes based on the salaries or wages of the employees performing the labor mentioned in paragraph (a) and those mentioned in paragraphs (d) and (e) of this Section X. Such contributions and/or taxes shall be for your account but are not included in the amount on which our fee is based. However, in the case of authorizations for work on the basis of the fee schedule for Class C under Section VIII and where the services of personnel mentioned in paragraph (d) of this Section X, if required, are furnished at salaries plus an equal amount for overhead expenses, the contributions and/or taxes on the salaries of the employees mentioned in said paragraph (d) shall be considered covered by the overhead [55] allowance and, therefore, shall not be otherwise reimbursable.

(g) Any traveling expenses or expenses of a similar character, and such other expenditures as we may make for your account.

(h) Fire, liability and other insurance, and the cost of rebuilding any work destroyed or damaged.

(i) Any expenses incurred and payments made in connection with accident or injury to person or property not covered by insurance. Such expenses and payments shall be for your account but are not included in the amount on which our fee is based.

(j) All discounts, rebates, earnings of commissary or other utilities, and similar receipts are creditable to "Cost of the Work."

XI. Termination of Work

If at any time you should wish, for any reason, to discontinue any project, you are at liberty after ten days' notice in writing to terminate our employment in connection therewith and to take possession of the work done and material and equipment purchased for you under the terms hereof.

Part III. Term of Contract

This proposal, when accepted by you, will become a contract effective as of January 2nd, 1948 to remain in force and effect for a period of five years from said date unless terminated by mutual agreement or by either party on thirty days' written notice to the other party, each party reserving the right to terminate the contract at will.

It is understood, however, that this contract shall continue in force and effect as to any work previously authorized and still in progress at the time of the termination of this contract, whether by expiration of said period of years or by notice as above provided, until the completion of such work, unless you specifically elect to terminate the

contract as to [56] any such work in accordance with Section XI of Part II hereof.

STONE & WEBSTER ENGI-
NEERING CORPORATION,

By /s/ C. A. BIGELOW,
Vice President.

Accepted January 29th, 1948.

SOUTHERN CALIFORNIA
EDISON COMPANY,

By /s/ E. R. DAVIS,
Vice President.

EXHIBIT No. E-1

Southern California Edison Company
Edison Building
Los Angeles 53, California

February 10, 1949

Mr. W. L. Budge, Steam Service Operator
Westinghouse Electric Corporation
600 St. Paul Avenue
Los Angeles 14, California

Dear Mr. Budge:

Reference is made to our Purchase Order No. 10332-SWR under which you are erecting the No. 2 house set at our Redondo Steam Station. Pending conclusion of the current issue between the Los Angeles Building and Construction Trades Council and the International Association of Machinists

concerning jurisdiction over the mechanical erection work on that unit, it is desired for the time being to suspend all erection work thereon as of today. Please understand that this instruction in no way nullifies or cancels the referenced Purchase Order.

Very truly yours,

/s/ W. L. CHADWICK,

Manager of Engineering
Department.

WLC:gf [58]

EXHIBIT No. E-2

February 11, 1949

Mr. W. L. Chadwick

Manager of Engineering Department

Southern California Edison Company

Edison Building

Los Angeles 53, California

Dear Mr. Chadwick:

Reference is made to your letter dated February 10, 1949 in which you state that you desire us for the time being to suspend all erection work on the No. 2 house set at your Redondo Steam Station, pending conclusion of the current issue between the Building and Construction Trades Council and the IAM concerning jurisdiction over the mechanical erection work on that unit.

In accordance with your instructions we have this date discontinued all erection work on the No. 2 house set at Redondo Beach, and have removed our two IAM machinists from the project. It is under-

stood, however, that the Redondo erection is being suspended for the sole reason that you have requested such action pending conclusion of the current dispute between the AFL and IAM and that any obligations on our part arising out of your Purchase Order No. 10332-SWR are also suspended.

We stand ready to complete this job whenever we are authorized by you to return to the project with our machinists.

Very truly yours,

W. L. BUDGE,

Steam Service Supervisor.

[Endorsed]: Filed May 16, 1949. [59]

[Title of District Court and Cause.]

ORDER ON DECISION

The Motion and Application of the Plaintiff for a temporary injunction, heretofore heard, argued and submitted, is now decided as follows:

Upon the grounds set forth in the Opinion filed this day, a temporary injunction will issue in the following terms:

That until final determination of this case, a temporary injunction will issue enjoining and restraining respondents, and each of them, their agents, servants, employees, attorneys and all parties in active concert or participation with them, from engaging in, or inducing or encouraging the em-

ployees of Stone and Webster, Westinghouse, or any other employers, to engage in a strike or [60] concerted refusal in the course of their employment, to use, manufacture, process, transport or otherwise handle or work on any goods, articles or materials or commodities belonging to or utilized by Stone and Webster, Westinghouse or any other employer engaged on the construction project for Edison at Redondo Beach, California, or to perform services for Stone and Webster, Westinghouse, or any other employer on said project, where an object thereof is to force or require Westinghouse and/or Stone and Webster to assign the work of installing steam turbine generators to members of respondent Millwrights, rather than to employees of Westinghouse who are now members of Machinists, or any other labor organization, unless respondent Millwrights is certified by the Board as the bargaining representative for the employees performing such work.

Findings to be prepared by counsel for the Petitioner, under Local Rule 7. Decree to conform.

Dated this 26th day of May, 1949.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed May 26, 1949. [61]

[Title of District Court and Cause.]

Yankwich, District Judge:

OPINION

I.

The Facts in the Case

On May 3, 1949, Howard F. LeBaron, Regional Director of the Twenty-first Region of the National Labor Relations Board, filed a petition for injunction under Section 10(1) of the National Labor Relations Act, as amended, (1) seeking relief pending the final adjudication by the Board of a matter then pending before them on charges alleging that the respondents are engaged in violations of Section 8(b), Subdivision 4(D) of the Act. (2)

The Respondents are the Los Angeles Building and Construction Trades Council—to be referred to as Council—a labor association consisting of eighteen labor organizations engaged in the building trades industry in the Los Angeles area, Lloyd A. Mashburn, its agent, Millwright and Machinery Erectors Local 1607 of the United Brotherhood of Carpenters and Joiners of America, American Federation of Labor—to be called Millwrights—and Herman R. Barbaglia, its agent.

On April 15, 1949, Local Lodge 1235 of the International Association of Machinists—to be called Machinists—filed charges with the Board alleging that the Respondents have engaged in, and are engaging in unfair practices in violation of the Act, which have been referred to the petitioner as Regional Director for investigation. [63]

The facts back of the charge are: Southern California Edison Company—to be designated as Edison—a California corporation, is a public utility engaged in furnishing electrical energy and service to the Los Angeles and Southern California area. Thirty-nine per cent of its output of electrical energy goes to instrumentalities of interstate commerce and concerns engaged in interstate commerce, such as oil refineries, rubber companies, steel plants and aircraft machines. In the operation of its business, Edison, during the past year, purchased raw materials of a value of in excess of three million dollars, of which approximately $66\frac{2}{3}$ per cent originated outside the State of California. Approximately $25\frac{1}{2}$ per cent of the total power utilized by it during the past year came from outside the state. Edison is now engaged in the construction and equipment of a new steam turbine electric power generation station at Redondo Beach, California, which was begun in July, 1946. The estimated completed cost of it is in excess of \$38,000,000.00, of which \$18,500,000.00 is the purchase value of equipment, \$12,700,000.00 in value of which has been, or will be transported from outside the State of California directly to the job site. The construction is 75 per cent completed and the units now in operation at the station furnish approximately 15 per cent of Edison's total output of electrical energy.

Stone and Webster, a construction corporation, has the general contract for construction of the station. For the past several months, it has had ap-

proximately 550 of its own employees working on the project. There are other sub-contractors, whose employees have been engaged on the project, [64] and who are members of all the trade unions affiliated with the Council.

Some time prior to December, 1948, Edison contracted with Westinghouse for the furnishing and installation of several steam turbine generators at Redondo Beach plant. These generators, of the total value of approximately \$4,800,000.00, were manufactured by Westinghouse in Lester and East Pittsburgh, Pennsylvania, whence they were shipped to California for installation.

On January 31, 1949, Westinghouse began the installation of one of the turbine generators, a 60,000 kilowatt unit pursuant to its contract with Edison. In the installation, it used employees who were members of Machinists. On February 2, 1949, the Respondents, as the Complaint alleges, engaged in and by "orders, directions and instructions induced and encouraged" the employees of Stone & Webster, Westinghouse and others on the Redondo Beach station project to "engage in a strike or concerted refusal in the course of their employment to transport, or, otherwise, handle or work" on Westinghouse products or to perform services for their employers in connection with the project.

Westinghouse Electric Corporation, on March 29, 1949, began the unloading of a turbine generator of 60,000 kilowatt units, shipped from its plant at Lester, Pennsylvania, to California for installation

by its employees, who are members of Machinists, at the Redondo Beach station, using in the unloading operation riggers who are members of International Association [65] of Bridge Structural and Ornamental Iron Workers Local No. 433, a constituent union of the Council.

On April 11, 1949, the Respondents engaged in and "by orders, directions, instructions induced and encouraged" the riggers employed by Westinghouse to engage in a strike or concerted refusal "in the course of their employment, to transport, or otherwise handle or work on the Westinghouse products" in connection with the Redondo Beach installation.

The object of the acts of the respondents was—in the language of the Complaint—to require Westinghouse and Stone and Webster to "assign the work of installing the steam turbine generators at the Redondo Beach station to members of Millwrights, rather than to the employees of Westinghouse, who now are members of Machinists."

The petition also averred the existence of a critical power shortage in Southern California, resulting from an inadequate supply of water for the generation of power and increased demand for electrical power—a shortage which the Redondo Beach station was planned to alleviate by generating electrical energy by steam and increasing Edison's production capacity by 30 per cent.

In the main, these facts are not disputed, either by the Return to the Order to Show Cause, or the affidavits filed in conjunction with the hearing on

the Order. It appeared at the hearing that only two members of Machinists were involved, who had been withdrawn from their job in order to [66] secure the return to work of the member unions of the Council. Before the hearing of the Order to Show Cause, on May 11, 1949, the Board rendered its decision under Section 10(k) of the Act. (3)

In substance, it found that the Respondents "are not and have not been, lawfully entitled to force or require Westinghouse Electric Corporation to assign work on the installation of steam turbine generators at Southern California Edison Company's plant at Redondo Beach, California, to members of Millwright and Machinery Erectors Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A.F.L., rather than to employees of Westinghouse Electric Corporation who are members of International Association of Machinists, Local Lodge 1235."

Other facts will be referred to further on in the opinion.

Before me is an application for a temporary injunction.

II.

The Legal Questions Involved

(A) The Aim of the Taft-Hartley Act.

The determination of the problem involved here calls for the interpretation of certain provisions of the Labor Management Relations Act of 1947, popularly known as the Taft-Hartley Act. (4) That, in turn, requires a consideration of the legislative ob-

ject sought to be attained. (5) One of the objects of the National Labor Relations Act (6), which this Act purported to amend and supplement, was to encourage "the practice [67] and procedure of collective bargaining" and to protect "the exercise by the workers of full freedom of association, self organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment and other mutual protection." (7)

The jurisprudence of the Act, declared both by the Board and the Courts, reflected these twin aims of the Act—the encouragement of unionization and of collective bargaining through it. For this purpose, the Act conferred certain rights on the workers as groups, and prohibited certain acts of the employers inconsistent with these aims, which were declared to be unfair practices on the part of the employers. (8) This it did through the use of plenary powers of the Congress to regulate interstate commerce. (9) The Taft-Hartley Act did not aim to confer any additional organizational rights. To the contrary, it aimed to take away certain rights, which, either by the language of the Act, or through administrative and judicial interpretation, had been held to flow from its enactment. As one writer has put it:

"The Taft-Hartley amendments represent an abandonment of the policy of affirmatively encouraging the spread of union organization and collective bargaining." (10)

This aim must be kept in mind in resolving the limited issue which the present proceeding presents.

(B) The Validity of the Prohibition Against
Forced Work Assignment.

At the outset, we are met with the challenge that Section 8(b)(4)(D) of the Act (11), which declares it to be an unfair practice on the part of a labor organization or its agent to force or require an employer to assign particular work to employees in a particular organization or group, rather than another, is unconstitutional.

As a matter of judicial policy, the constitutionality of a statute should not be determined upon a motion of this character, but rather upon a full hearing on the matters. For the factual situation may affect the constitutional aspects of a statute. Such an attitude is enjoined upon us by the principle which commands us to place upon any statutory enactment an interpretation consistent with constitutionality. (12) The broad implications of the earlier labor cases (13), which equated certain union practices with the guaranty of free speech of the First Amendment, have been brushed aside by the later decisions of the Supreme Court. (14) The gloss of the late cases is that both the state legislatures and the Congress may prohibit union practices which they deem socially harmful. Very recently, the Supreme Court stated that neither the First nor the Thirteenth Amendment stands in the way of outlawing certain acts by unions or their agents. (15) The statute under consideration per-

mitted a State Board to forbid intermittent and unannounced work stoppages. A state statute prohibiting peaceful picketing [69] was sustained (16) against the attack that it interfered with the dissemination of truthful information about a labor dispute under the doctrine of *Thornhill v. Alabama*. (17) So-called "right-to-work" statutes, which forbid denial of employment because of non-membership in labor organizations have been given judicial sanction in almost unanimous decisions. (18) These state enactments preceded the Taft-Hartley Act. In fact, they represent local movements to limit the organizational rights of labor which the Taft-Hartley Act, later, sought to, and did, adopt as national policy. Whether it is socially wise to determine by legislation policies which heretofore had been left to the "collective bargaining and the play of economic forces" (19), is beyond the scope of this inquiry. Our reference to it is merely to point to the touchstone by which the Act must be assayed. And the conclusion is inescapable that, in dealing with the almost limitless power to regulate commerce, the Congress cannot be said to have exceeded its constitutional bounds when it declared coercion in the assignment of work (and "requiring," by use of economic power, is as coercive as "forcing") to one rather than another individual or group to be an unfair labor practice, when states can, by legislation, prohibit group practices by unions which deny employment to outsiders, interfere with production unnecessarily or result in sec-

ondary boycotts or in picketing of the most peaceful manner.

Apposite on the subject are the words of Judge Bratton: [70]

“The constitutional right of free speech and free press postulates the authority of Congress to enact legislation reasonably adapted to the protection of interstate commerce against harmful encroachments arising out of secondary boycotts. The promulgation and circulation of a blacklist and the picketing of premises as the means of waging a secondary boycott which has the effect of substantially burdening or obstructing interstate commerce is not protected by the First Amendment or section 8(c) of the Act. Concretely, neither the constitutional nor statutory provision protected appellants in their blacklisting of Klassen and their picketing of its premises as a means of waging a secondary boycott against that company, with substantially harmful effect upon interstate commerce.” (20)

We conclude that the section under discussion presents no constitutional infirmity.

III.

The Adequacy of the Showing in the Case

(A) Discretion in Granting Temporary Injunctions.

We come now to the showing made in the case, which the Respondents claim to be inadequate. Before considering the matter, we advert to the principle that the granting or denying [71] of a tem-

porary injunction is “primarily a matter of discretion for the trial judge.” (21) That this general principle has found application in cases arising under this very Act is evidenced by the following language of the Court of Appeals for the Tenth Circuit:

“It is not the inflexible duty of the court in every case of this kind to grant a temporary injunction to remain in force and effect until the Board makes its final adjudication of the charge of unfair labor practice. The court has a reasonable permissive range for the exercise of its discretion in the granting of injunctive relief appropriate to the particular circumstances presented, or in withholding its writ.” (22)

The steps required for invoking the jurisdiction of this court are described in Section (10)(1) of the Act, which reads, in part:

“Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4), (A), (B), or (C) of section 158(b) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the officer where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the [72] matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the

District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law:" (23) The final clause of the Act reads:

"In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 1 58(b)(4)(D) of this title." (24)

The Respondents seem to think that the clause last cited is meaningless. They call it "an after-thought." We see no reason for so labelling it. It follows the pattern adopted in legislation where, after describing, in detail, a procedure to apply under certain conditions, an omnibus clause is added declaring that the same procedure shall obtain under other provisions of the Act. So here, it is first recited that before an application is made to the court, there must be (1) a charge of unfair labor practices, (2) a preliminary investigation, (3) reasonable belief induced by the investigation that the charge is true and that a Complaint should issue. It is then specifically provided that this procedure shall not only apply to violations of unfair labor

practices under Section 8(b) (4) (A, B, and C) but also as to 8(b) (4) (D). Time does not permit an investigation to determine the origin of the last clause or the reason why it was not included in the general language of the subdivision. It may be surmised that it originated some time during the legislative transformation which the Act underwent before the two Houses or in conference and that, rather than rewrite the entire section to include Clause (D), the specific provision was added. Be that as it may, it is quite apparent that it is just as effective to make the procedure applicable to violations under Clause (D) as to the others. In conformity with the requirements of the Statute, as already appears, the Complaint alleges the making of a charge, which is attached to the petition as an exhibit. Examination shows that the charge is contained in more or less formal documents on printed blanks supplied, evidently, by the Board and signed by a representative of the Machinists. The specific acts complained of are set out in the petition and the affidavits which accompanied it. An extensive hearing was had, after notice, and testimony was taken on behalf of the complainants and respondents. It has been stated that the transcript covers over [74] 1000 pages. Portions of it contained in affidavits filed in conjunction with the hearing exceed 150 pages.

On May 11, 1949, the Board rendered its decision, the terms of which are adverted to in the statement of facts. The petition states that the Regional

Director, to whom was delegated the duty to make the investigation, and after such investigation

“has reasonable cause to believe that the said second amended charge is true and that a complaint of the Board based thereon should issue against the respondents pursuant to Section 10(b) of the Act. More particularly, and upon the basis of such investigation and of the evidence disclosed as a result thereof, petitioner has reasonable cause to believe and believes that respondents have engaged in conduct in violation of Section 8(b), subsection (4)(D) of the Act, and affecting commerce within the meaning of Section 2, subsection (6) and (7) of the Act.”

The action of the Board, in making a determination under the provision of Section 10(k) of the Act, is a confirmation of the existence of reasonable cause to believe that the charge is true. It is true that no coercive action has yet been taken by the Board. For, under the provisions of the Act, the Respondents have the alternative of either complying with the decision or of voluntarily adjusting the dispute with the employers. Either of these acts, if it occurs, will be followed [75] by a mandatory dismissal. At the time of the hearing, there was no indication of the action to be taken by the Respondents. The order could not, as it claimed, make the question before the Court moot, unless there is compliance or adjustment before action is taken on the matter pending before the Court. The time for such action has long passed, and, when this

is written, there has been neither compliance nor adjustment. The Respondents would have us review the facts and determine either that the determination by the Board was wrong or that the facts were such that they do not show reasonable ground for believing that a violation of law had occurred.

(B) Reasonable Grounds.

Even if we were sitting as a court of appeal with power to review the sufficiency of the findings of the Board, we would be bound to follow them, if based upon conflicting testimony or upon divergent inferences which could be drawn from even admitted facts. (26) As it is, the invocation of the power of this court is not conditioned upon such finding. All the petitioner has to show is that he has reasonable cause to believe that the charge is true and that a complaint should issue. The phrases "reasonable cause" or "reasonable ground" are standard in law. Their meaning, when made a condition for action, has long been established. The test by which compliance is determined is whether the facts are such that a reasonable person could be led to believe that they constitute a violation of law. They need not be sufficiently to actually prove such violation. As said by the Court of Appeals for the Eighth [76] Circuit, in interpreting a similar requirement under the Fair Labor Standards Act:

"For investigatory purposes under the Act, it would amount simply to a justifiable basis for believing that a certain state of facts probably exists, derived from reasonable inquiry or other credible

information. As applied to the immediate situation, it would be such facts or information as reasonably would lead the Administrator to believe that appellees' business, in some phase, was apparently and probably subject to the Act." (27)

It is undisputed that the controversy here relates to the right of Machinists to have the work assigned to them rather than have it assigned to some of the members of the unions in the respondent group. Whether we call this a "jurisdictional" dispute or not is immaterial. The lengthy hearing, the fact that the Respondents did call, and are threatening to call again, a strike involving over 500 persons, in order to enforce the demand that two machinists be not given particular work, indicates the seriousness of the situation. And the insistence of Machinists, whether they constitute a bona fide labor organization, or we apply to them the term so opprobrious in labor circles of "company union," on the right of the two men to this work, is definite proof that a situation has arisen where the Regional Director can reasonably reach the conclusion that the problem involved is an attempt on the part of the respondents to "force" or "require" their employers to assign the work to a particular labor organization, group or class. The Act does not exclude company unions from the designation of "labor organization." The term is defined in this manner:

"The term 'labor organization' means any organization of any kind, or any agency or employee rep-

resentation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.” (28)

This definition is broad enough to cover, as its language specifically states, any organization of any kind, or any agency or representation committee of workers. The fact alluded to at the argument that this particular group may have been organized at the instigation of the employer is of little significance. For, as already stated, it is not the object of the statute to further “regular” labor organizations. Indeed, it seeks to curtail their authority and to set up against them the rights of others, whether organized or not. A writer, who is in sympathy with the policy of the Act, sets forth as one of the changes in the philosophy of labor-management relations, introduced by the Act, the fact that

“The Act confers for the first time upon employees the right to ‘refrain’ from exercising the right to [78] join a union, except in the case of a union shop.” (29)

So the problem must be solved with this aim of the Act in view. To say that, in the light of the facts which are before the Court, the Regional Director has not shown reasonable ground for his belief that a violation has occurred, is to totally disregard the realities which the record in this proceeding presents.

Grant that, notwithstanding the Director’s con-

clusion, the granting of a temporary injunction still remains discretionary, what has just been said shows conclusively that it should issue. The aim of all legislation and of government, for that matter, is to achieve social peace. The aim of labor legislation is to achieve peace in labor relations. The means of achievement are under the sole control of legislators. Here the legislative body has laid down a complete scheme which must be followed both in the realms of administration and judicature. In matters as to which discretion is rested in the court, the inquiry in a particular case should be whether the public goodwill be served by using its coercive powers. That calls for a balancing of interests, in the light of social aims to be attained. Courts should, and do, hesitate to issue temporary injunctions pending the final determination of a lawsuit, when such action would, in effect, settle the controversy. Here, the issuance of the injunction would not mean such determination. It would merely mean that two men would be permitted to do certain work until the Board determines—assuming that there is no compliance [79] or adjustment of the proceeding pending before it—whether other action shall be taken under the Act. The presence of two men on a project requiring the services of hundreds would not result in any damage to the respondent organizations or any loss of prestige or “face” to them or their members. If the ultimate action favor Machinists, it would merely mean that on the particular job—which may be completed by the time the Board has made a final order—two out-

siders—let us call them “interlopers”—have done part of the work. Well, the Taft-Hartley Act postulates the possibility that situations may arise where persons not connected with regular or orthodox labor organizations might work along side of the members of such organizations. If the ruling be in favor of the Respondents, then the loss is not greater than that two persons have drawn employment from a source which, by right, belongs to the respondents.

As against this, we have the threat of a strike by hundreds of persons on a construction and installation which undeniably has the character of interstate commerce, (30) from which great harm can flow, not only to the employers, but to the community which the Edison Company serves. This, because of the consequential delay in the construction of a plant, the aim of which is to increase the availability of electrical power for transmission and distribution in interstate commerce, at a time when there is a diminution of the water supply due to the scanty rain-fall in this region in the last four or five years. [80]

So a temporary injunction until the Board determines the controversy by a final order will serve the public good.

The motion for temporary injunction is granted, in terms contained in separate order filed herewith.

Dated this 26th day of May, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge. [81]

Notes to Text

1. 29 U.S.C. Supp. 1 (1948), Sec. 141 et seq.
2. 29 U.S.C. Supp. 1 (1948), Sec. 158(b)(4)(D).
3. 29 U.S.C. Supp. 1 (1948), Sec. 160(k).
4. 29 U.S.C. Supp. 1 (1948), Sec. 141 et seq.
5. *United States v. American Trucking Assns.*, 1940, 310 U.S. 534, 543-544; *Chatwin v. United States*, 1946, 326 U.S. 455, 463-464; *United States v. Carbone*, 1946, 327 U.S. 633, 637-639.
6. 29 U.S.C.A., Sec. 151 et seq.
7. 29 U.S.C.A., Sec. 151.
8. 29 U.S.C.A., Sec. 160.
9. *National Labor Relations Board v. Jones-Laughlin Steel Corp.*, 1937, 301 U.S. 1. When exercising this power, the Congress has the unlimited choice of means "considered necessary for bringing about the desired conditions in the channels of interstate commerce." (*American Power Co. v. Securities Exchange Commission*, 1946, 239 U.S. 90, 100.)
10. Archibald Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 *Harvard Law Review*, p. 1 et seq.; p. 274 et seq., at p. 44.
11. 29 U.S.C.A., Sec. 158(b)(4)(D).
12. *Anniston Mfg. Co. v. Davis*, 1937, 301 U.S. 337, 351-353; *Ex parte Endo*, 1944, 323 U.S. 283, 299-300. [82]

13. Cf. *Thornhill v. Alabama*, 1940, 310 U.S. 88.
14. *Barbara Nachtrieb Armstrong, Where Are We Going With Picketing?*, 1948, 36 Calif. Law Rev., p. 1.
15. *International Union A.U.W.A. v. Wisconsin Empl. Relations Board*, 1948, 336 U.S. 245, 251.
16. *Bigoney v. Empire Storage and Ice Co.*, 1947, 330 U.S. 490.
17. *Thornhill v. Alabama*, 1940, 310 U.S. 88.
18. *Lincoln Federal Labor Union v. Northwestern Co.*, 1949, 335 U.S. 525; and see, *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 1949, 336 U.S. 301.
19. *Archibald Cox*, op. cit., p. 315; and see, *Thomas R. Mulroy, The Taft-Hartley Act in Action*, 1948, 15 University of Chicago Law Review, p. 595, et seq.
20. *United Brotherhood of Carpenters v. Sperry*, 1948, C.A. 10, 170 F(2) 963, 869; and see, *Painting Specialties and Paper etc. v. LeBaron*, 1949, C.A. 9, 171 F(2) 331.
21. *Lane Bryant Inc. v. Maternity Lane*, 1949, C.A. 9, 173 F(2) 559, 564; and see, *Virginia Ry. Co. v. Federation*, 1937, 300 U.S. 515, 552; *Hecht Co. v. Bowles*, 1944, 321 U.S. 321.
22. *United Brotherhood of Carpenters v. Sperry*, 1948, C.A. 10, 170 F(2) 863, 868.

23. 29 U.S.C.A., Sec. 160(L).

24. 29 U.S.C.A., Sec. 160(L).

25. 29 U.S.C.A., Sec. 160(k).

26. *Grace Bros. v. Commissioner*, 1949, C.A. 9, 173 F(2) 170; *Yankwich, Findings Under the Federal Rules of Civil Procedure*, 1948, 8 F.R.D., 271, 288. [83]

27. *Walling v. Benson*, 1943, C.A. 8, 137 F(2) 501; and see, *Grant v. National Bank*, 1878, 97 U.S. 80; *McDougal v. General Finance Corp.*, 1941, C.A. 7, 123 F(2) 99; *Cusick v. Second National Bank*, 1940, App. D.C., 115 F(2) 150, 153-155; *Bowles v. Montgomery Ward & Co.*, 1944, C.A. 7, 143 F(2) 38, 42; *Van Sant v. American Exp. Co.*, 1947, 158 F(2) 924, 930. Even in criminal law, when a showing of "reasonable" or "probable" cause or ground is required—such as, for instance, before holding a defendant to answer after preliminary examination—under Rule 5(c) of the Federal Rules of Criminal Procedure—only a *prima facie* showing need be made. And, the evidence need not be of a character which would convict. See, *McNamara v. Henkel*, 1913, 226 U.S. 520; *Collins v. Loisel*, 1922, 259 U.S. 309; *Burton v. Smithers*, 1929, C.A. 4, 31 F(2) 966; *Curreri v. Vice*, 1935, C.A. 9, 77 F(2) 130. *Yankwich, Commentary on Criminal Rules*, 1946, p. 149.

28. 29 U.S.C.A., Sec. 152(5).

29. Mulroy, op. cit., loc. cit., at 596.

30. Wickard v Filburn, 1942, 317 U.S. 111; National Labor Relations Board v. Fainblatt, 1939, 306 U.S. 601; Mabey v. White Plains Pub. Co., 1946, 327 U.S. 178; Mandeville Island Farms v. American Sugar Co., 1948, 334 U.S. 219.

[Endorsed]: Filed May 26, 1949. [84]

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECREE AND TEMPORARY INJUNCTION

Come now Los Angeles Building and Construction Trades Council, Lloyd A. Mashburn, Millwright and Machinery Erectors, Local 1607 of United Brotherhood of Carpenters and Joiners of America, A.F.L., and Herman Barbaglia, respondents herein, and aver that petitioner's proposed findings of fact, conclusions of law and proposed decree do not conform to Rule 65 (d) of the Rules of Civil Procedure for the District Courts of the United States, which provide:

“Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint [85] or other document, the act or acts

sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.”

Respondents and each of them hereby object to the following paragraphs of the proposals:

I.

Respondents and each of them object to petitioner's description of the order as a temporary injunction (page 1, lines 27-28, et seq.), and hereby request that the following be substituted for the same, “interlocutory injunction,” or “injunction.” It is noted that the Rules of Civil Procedure do not refer to “temporary injunctions,” but do discuss “injunctions” (Rule 65), “interlocutory injunctions” (Rule 52), and “preliminary injunctions” (Rule 65). This objection is noted for the purpose of pointing out the distinction between the injunctive relief here sought and the temporary restraining order (Rule 65 (b) (e)), from which no appeal may be had.

II.

Objections to Petitioner's Proposed Findings of Fact

The sixth finding of fact, reciting as it does the filing of the amended charge dated April 15, 1949, injects into the case matters over which the court

has no jurisdiction because such matters were not considered by the National Labor Relations Board either at the hearing held before the Regional Director or before the Board itself resulting in the decision of the Board referred to in finding No. 8. It is only matter which the Regional Director had a right to exercise his official determination with respect to the issuance of a complaint that may be heard and determined in this [86] case. The evidence before the court and the decision of the National Labor Relations Board are confined to the matter presented to the Board in the 10 (k) proceeding and not more. At the time the second amended charge was filed the hearing in the 10 (k) proceeding had been finished and the matter was pending before the Board for determination. The Board in its decision (Footnote 8) specifically stated that it was confining its decision to matters presented to it in the 10 (k) hearing and was deciding no dispute except that one. So that all the matters contained in the charge of April 15, 1949, have not been considered by the Board nor has the petitioner instituted 10 (k) proceedings to hear and determine the additional matter therein contained.

Under the Board's rules and regulations, Series 5 as amended August 18, 1948, which are binding upon the petitioner as well as respondents, Section 203.74 through Section 203.77 requires that the issuance of any complaint by the Regional Director must be bottomed upon a determination made by the

Board after a period of time within which a settlement of the dispute may be accomplished.

As to matters in the charge of April 15, 1949, which were not included in the original or first amended charge, those matters have not been presented to the Board for determination and hence the Regional Director has not had authority to determine that a complaint should issue upon such matters, and therefore the encompassing of such matters in the findings of fact is contrary to the evidence and to the law.

The eighth finding of fact is objected to because it is a conclusion of law and not a finding of fact. It purports to be a condensation of the Board's decision under the 10 (k) proceeding, and is incomplete and inaccurate in that it does not show that the decision of the Board was restricted to the dispute which arose allegedly on or about February 2, 1949, and does not set forth the findings of the Board with respect to the rights of the International [87] Association of Machinists members and seeks to have the court find as facts matters which have not been heard and determined by the Board.

Finding No. 9 (a), (b), (c) and (d) is objected to as not being supported by the evidence in the case, and the conclusions are erroneous based upon such evidence as does exist in the case.

Finding No. 9 (e) is objected to as not being supported by the evidence and is contrary to the substantial evidence of the cause, which reveals

that the labor dispute is a protest action of respondents against the unfair labor practices being committed by Westinghouse and the International Association of Machinists. The substance of this finding is only a conclusion of law and merely a repetition of the allegations made by petitioner in his complaint. There is no specification as to the acts found and none are described in reasonable detail, and it is impossible to determine from this proposed finding just what acts are found by the court to constitute such conduct which would authorize the court to enjoin the same. The finding as presently proposed merely sets forth in statutory language the legal conclusions found in the Act. It is respondents' contention that this does not constitute a finding of fact and that such acts and conduct as the court has found enjoinable should be set forth by specification and in reasonable detail.

Respondents object to finding No. 9 (f) for the reason that there is absolutely no evidence before this court that the respondents or any of them have failed to comply with the decision and determination of the dispute of the Board in the proceeding arising under Section 10 (k) of the Act.

Respondents object to finding No. 9 (g) for the reason that it is not supported by the evidence.

Respondents object to finding No. 9 (h) for the reason that it is not supported by the evidence.

Respondents object to finding No. 9 (i) for the reason [88] that it is not supported by the evidence.

III.

Objections to Petitioner's Proposed Conclusions of Law

Respondents object to conclusion No. 1 as being contrary to the law and the evidence in the case.

Respondents object to conclusion No. 4 on the grounds that this honorable court does not have jurisdiction of the proceedings and of the respondents pursuant to the provisions of Section 10 (1) of the Act, or that it may grant any injunctive relief.

Respondents object to conclusion No. 5 as being contrary to the law and the evidence of the case in that Section 10 (1) and Section 8 (b) (4) (D) are unconstitutional and void, being in contravention of the First, Fifth and Thirteenth Amendments of the Constitution of the United States.

Respondents object to conclusion No. 6 in that Section 8 (b) (4) (D) is contrary to the First, Fifth and Thirteenth Amendments of the Constitution of the United States.

Respondents object to conclusion No. 7 in that petitioner violates Rule 65 (d) of the Rules of Civil Procedure hereinabove set forth, in that the application of the injunction is not limited to respondents, their officers, agents, servants, employees and attorneys and to those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, in that the conclusion sweeps within its ambit activities, classes and employees which the court has not

had before it and over which the court may not issue a valid or legal order. This is not a proper conclusion of law in that the conclusion, like the decree, must set forth "acts" in detail and not by reference to pleadings or findings. Related acts or conduct, indefinite and ambiguous, cover matters which have not been the subject of administrative requirements and the administrative provisions of the [89] Act have not been exhausted as required therein, and there is no evidence upon which such a conclusion may be based. No injunction should issue beyond the dispute which the Board heard and determined, for that is the only subject which can be litigated by the Board and brought to a final determination. The conclusion as here drawn blankets possible acts upon which there cannot possibly be a final determination within the purview of the administrative proceedings which gave rise to the instant petition.

IV.

Objections to Petitioner's Proposed Decree

Respondents object to petitioner couching the proposed decree in the language of the Act, which language is so vague and indefinite that it will be impossible for the petitioner and the respondents to know what conduct is allowed and what conduct is limited by the decree. Such proposed decree is contrary to Rule 65 (d) in that it does not specify the acts enjoined, nor does it describe them in reasonable detail, and the proposed decree is indefinite

and uncertain as to the act or acts sought to be restrained. There is no way that respondents can determine from this language what acts are permissible. The proposed decree does not describe with sufficient clarity what work is involved in the phrase "installing steam turbine generators." There are other classes and types of labor which are engaged and which will engage in the work of "installing steam turbine generators," such as electricians, riggers and pipefitters, all of whom perform integral parts in such installation. As the decree is now drawn the legal rights of the latter groups to perform their legal duties and to protect their legal rights are restricted along with the rights of others, and opens the ground for invasion of the Machinists into the types latterly mentioned without affording to the latter groups any protection of their legal rights to work.

The decree is further objectionable because it is broader than the dispute involved and decided by the Board, and unnecessarily restricts all legitimate rights of respondents and their members, and requires the members to work against their wishes and desires, prohibits their withholding their services for the protection of their own jobs and for other legitimate reasons. Further, it invades the right of speech communication and nullifies the rights guaranteed to the members of respondent unions under Sections 7 and 8 (c) of the National Labor Relations Act as amended.

The injunction should be confined to affirmative

orders issued subsequently to the injunction by the organizations as such. The proposed decree forbids the right to quit or withhold services of individuals, so that if two or more members quit at the same time the decree would be offended and subject such persons to contempt citations. The decree should further provide for the protection afforded under Section 8 (c) by excluding in its language acts which do not involve threats of reprisal or promises of benefit.

Respectfully submitted,

/s/ ARTHUR GARRETT,

Attorney for Respondents.

Receipt of a copy of this document on June 6, 1949 at 2:30 p.m. is hereby acknowledged.

/s/ JEROME SMITH,

Attorney for Petitioner.

Objections considered and overruled, except as indicated.

/s/ L. R. Y.,

Judge.

[Endorsed]: Filed June 6, 1949. [91]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard upon the verified petition of Howard F. LeBaron, Regional Director of the Twenty-First Region of the National Labor

Relations Board, on behalf of said Board, for a preliminary injunction pending final adjudication of the Board of the matters involved, and upon issuance of the rule to show cause why injunctive relief should not be granted as prayed in the petition. The Court has fully considered the petition, return, points and authorities, documentary evidence, affidavits and oral argument counsel presented at a hearing held herein. Upon the entire [92] record, the Court makes the following:

Findings of Fact

1. Petitioner is Regional Director of the Twenty-first Region of the National Labor Relations Board (herein called the Board), an agency of the United States Government, and has filed this petition for and on behalf of the Board.

2. Respondent Los Angeles Building and Construction Trades Council (herein called Council), an unincorporated association composed of eighteen (18) labor organizations engaged in the building trades industry, is a labor organization within the meaning of Section 2 (5) and 10 (1) of the Act, and is engaged within this judicial district in promoting and protecting the interests of its constituent unions and their employee members.

3. Respondent Lloyd A. Mashburn is, and at all times material herein has been, an agent of respondent Council engaged within this judicial district in promoting and protecting the interests of

respondent Council's constituent unions and their employee members.

4. Respondent Millwright and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A.F.L. (herein called Millwrights), an unincorporated association and a constituent union of respondent Council, is a labor organization within the meaning of Sections 2 (5) and 10 (1) of the Act, and is engaged within this judicial district in promoting and protecting the interests of its employee members.

5. Respondent Herman Barbaglia is, and at all times material herein has been, an agent of respondent Millwrights engaged within this judicial district in promoting and protecting the interests of respondent Millwrights' employee members.

6. On or about April 15, 1949, Local Lodge 1235 of the International Association of Machinists (herein called Machinists), an independent labor organization not affiliated with respondent Council, pursuant to the provisions of the Act filed a second amended charge with the Board to a charge filed originally on February 2, 1949, and amended on March 8, 1949, said second amended charge alleging that respondents have engaged in and are [93] engaging in unfair labor practices within the meaning of Sections 8 (b), subsection (4) (D) of the Act.

7. Said charge was referred to petitioner for in-

vestigation, who caused an investigation thereof to be made.

8. On May 11, 1949, the National Labor Relations Board issued a Decision and Determination of Dispute in a proceeding involving respondents arising under Section 10 (k) of the Act. In its Determination the Board held that the Los Angeles Building and Construction Trades Council, A.F.L., and Lloyd A. Mashburn, its agent, and Millwright and Machinery Erectors Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A.F.L., and Herman F. Barbaglia, its agent, are not, and have not been, lawfully entitled to force or require Westinghouse Electric Corporation to assign work on the installation of steam turbine generators at Southern California Edison Company's plant at Redondo Beach, California, to members of Millwright and Machinery Erectors Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A.F.L., rather than to employees of Westinghouse Electric Corporation who are members of International Association of Machinists, Local Lodge 1235. A copy of said Decision and Determination of Dispute was served on respondents on May 13, 1949.

9. There is, and petitioner has, reasonable cause to believe that:

(a) Westinghouse Electric Corporation (herein called Westinghouse), maintains, inter alia, two plants in the Commonwealth of Pennsylvania,

where it is engaged in the manufacture of turbines and generators. A substantial amount of the raw materials used in the production of these turbines and generators comes from outside the commonwealth of Pennsylvania. A substantial amount of the turbines and generators manufactured at these plants is sold to customers outside the Commonwealth of Pennsylvania.

(b) Southern California Edison Company (herein called Edison) is a utility company and delivers electric power to consumers in southern California. A substantial amount of its sales is to industrial consumers who are engaged in interstate commerce. A substantial amount of its purchases, including the turbine generators involved in this action, are [94] shipped to Edison from outside the State of California.

(c) Stone and Webster Engineering Corporation (herein called Stone and Webster) is a general contractor engaged in the construction business. Its construction activities are large scale, mainly commercial and industrial, and extend to every state in the United States.

(d) Edison is now engaged in the construction and equipment of a new steam turbine electric power generating station at Redondo Beach, California, the construction of which was begun in July, 1946, and the estimated completed cost of which is in excess of \$38,000,000. Stone and Webster has the general contract for the construction of the Redondo Beach station and for the past several

months it has had approximately 550 of its own employees working on the project. In addition, numerous employees of various subcontractors have been engaged on the construction project. Among these employees are members of substantially all the building trades unions affiliated with respondent Council. Some time prior to December 1948, Edison entered into arrangements with Westinghouse for the latter to furnish and install several steam turbine generators at the Redondo Beach station. On or about January 31, 1949, Westinghouse began the installation of one of the turbine generators, a 6,000 kilowatt unit, pursuant to its contract with Edison. To make the installation it used, inter alia, employees who were members of the Machinists.

(e) Respondents on or about February 2, 1949, and at all times since that date, have, by orders, directions and instructions, induced and encouraged employees of Stone and Webster, Westinghouse and other employers engaged at the Redondo Beach station to engage in a strike or concerted refusal in the course of their employment to transport or otherwise handle or work on Westinghouse products or to perform services for their employers in connection with the Redondo Beach project, an object thereof being to force or require Westinghouse to assign the work of installing the steam turbine generators at the Redondo Beach station to members of respondent Millwrights rather than to the employees of Westinghouse who are now members of the Machinists. [95]

(f) Respondents have failed to comply with the Decision and Determination of Dispute of the Board in the proceeding arising under Section 10 (k) of the Act as aforesaid and have not voluntarily adjusted the dispute out of which the unfair labor practice charge arose.

(g) Respondent's acts and conduct hereinabove mentioned constitute an unfair labor practice within the meaning of Section 8 (b), subsection 4 (D) of the Act.

(h) Respondent's acts and conduct hereinabove mentioned have a substantial relation to trade, traffic, and transportation among the several states and tend to lead to labor disputes burdening or obstructing the free flow of commerce.

(i) Respondents, unless restrained and enjoined therefrom, will continue to engage in the above acts and conduct or similar or related acts and conduct in violation of Section 8 (b), subsection 4 (D) of the Act and which tend to lead to labor disputes burdening or obstructing the free flow of commerce.

Conclusions of Law

1. Westinghouse, Edison and Stone and Webster are engaged in interstate commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

2. Respondents Council and Millwrights are labor organizations within the meaning of Section

2, subsection (5) and Section 10 (1) of the Act.

3. Respondent Lloyd A. Mashburn is, and at all times material herein has been, an agent of respondent Council, and respondent Herman Barbaglia is, and at all times material herein has been, an agent of respondent Millwrights, within the meaning of Section 8 (b) of the Act.

4. The Court has jurisdiction of the parties and the subject matter of this proceeding, and, under Section 10 (1) of the Act has authority to grant injunctive relief.

5. There is reasonable cause to believe that respondents have engaged in, are engaged in, and, unless restrained and enjoined therefrom, will continue to engage in, an unfair labor practice within the meaning of [96] Section 8 (b), subsection 4 (D) of the Act, affecting commerce within the meaning of Section 2, subsections (6) and (7) of the Act, and that a continuation of this practice will impair the policies of the Act as set forth in Section 1 (b) thereof.

6. Section 8 (b), subsection 4 (D) of the Act does not exceed the bounds of Congressional power to regulate commerce nor is this section violative of the First, Fifth or Thirteenth amendments to the Constitution.

7. Pending the final adjudication of the National Labor Relations Board with respect to the matters herein, it is just and proper that respondents, their

agents, servants, employees, attorneys, and all other persons acting in active concert or participation with them, be enjoined and restrained from the commission of the above acts and conduct or similar or related acts or conduct or repetitions thereof.

In accordance herewith an injunction shall issue forthwith against respondents as prayed, pending final adjudication of the Board of the matters herein.

Made and entered at Los Angeles, California, this 8th day of June, 1949.

/s/ LEON R. YANKWICH,
U.S. District Judge.

Receipt of a copy of this document on May 31, 1949 at 3 p.m. is hereby acknowledged. Disapproved as to form. Objection will be filed.

/s/ ARTHUR GARRETT,
Attorney for Respondents.

[Lodged]: May 31, 1949.

[Endorsed]: Filed June 8, 1949. [97]

In the United States District Court for the Southern District of California, Central Division

No. 9629-Y

HOWARD F. LEBARON, Regional Director of the Twenty-First Region of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board,

Petitioner,

vs.

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL; and Its Agent LLOYD A. MASHBURN; MILLWRIGHT AND MACHINERY ERECTORS, LOCAL 1607 OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L.; and Its Agent HERMAN BAGLIA,

Respondents.

DECREE

This cause came on to be heard upon the verified petition of Howard F. LeBaron, Regional Director of the Twenty-First Region of the National Labor Relations Board, on behalf of said Board, for a temporary injunction pending adjudication by the Board of the matters involved, and a rule to show cause why injunctive relief should not be granted. The Court upon consideration of the petition, return, points and authorities, documentary evidence, affidavits and oral argument of counsel for the parties, and after consideration of Respondents' objec-

tions to Petitioner's [98] proposed findings of fact and conclusions of law, duly made and entered its findings of fact and conclusions of law.

It is, therefore, by this Court,

Ordered, Adjudged, and Decreed that respondents Los Angeles Building and Construction Trades Council, Lloyd A. Mashburn, Millwright and Machinery Erectors, Local 1607, of United Brotherhood of Carpenters and Joiners of America, A.F.L., and Herman Barbaglia, and each of them, their agents, servants, employees, attorneys and all persons in active concert or participation with them, be and they hereby are, restrained and enjoined, pending the final adjudication by the National Labor Relations Board of the matters herein involved, from:

Engaging in, or inducing or encouraging the employees of Stone and Webster, Westinghouse, or any other employers, to engage in a strike or concerted refusal in the course of their employment, to use, manufacture, process, transport or otherwise handle or work on any goods, articles or materials or commodities belonging to or utilized by Stone and Webster, Westinghouse or any other employer engaged on the construction project for Edison at Redondo Beach, California, or to perform services for Stone and Webster, Westinghouse, or any other employer on said project, where an object thereof is to force or require Westinghouse and/or Stone and Webster to assign the work of installing steam turbine generators to

members of respondent Millwrights, rather than to employees of Westinghouse who are now members of Machinists, or any other labor organization, unless respondent Millwrights is certified by the Board as the bargaining representative for the employees performing such work.

Dated at Los Angeles, California, within said District and Division this 8th day of June, 1949, at the hour of 10 o'clock a.m.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Receipt of a copy of this document on May 31, 1949, at 3 p.m., is hereby acknowledged. It is approved as to form. Objections will be filed.

Judgment entered June 10, 1949.

/s/ ARTHUR GARRETT,
Attorney for Respondents.

[Lodged]: May 31, 1949.

[Endorsed]: Filed June 8, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court, the Petitioner Above Named, and to His Attorneys, Robert N. Denham, David P. Findling, Winthrop A. Johns, Charles K. Hackler, and Jerome Smith:

Notice is hereby given that Los Angeles Building and Construction Trades Council; and its agent

Lloyd A. Mashburn; Millwright and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A.F.L.; and its agent Herman Barbaglia, respondents herein, and each of them, hereby appeal to the Court of Appeals for the Ninth Circuit from that certain judgment entered in this action on [100] June 10, 1949, in favor of the petitioner and against respondents and granting an injunction against respondents, and from each and every part of said judgment.

Dated this 8th day of July, 1949.

/s/ ARTHUR GARRETT,

Attorney for Respondents.

[Endorsed]: Filed July 8, 1949. [101]

[Title of District Court and Cause.]

RESPONDENTS' EXHIBIT A

AFFIDAVIT OF ARTHUR GARRETT

State of California,

County of Los Angeles—ss.

Arthur Garrett, being first duly sworn, deposes and says:

That he is an attorney, duly licensed in the Courts of the State of California and in this Federal District Court, and is attorney for the respondents herein.

That pursuant to the provisions of Section 10-k of the National Labor Relations Act, as amended

Respondents' Exhibit A—(Continued)

June 23, 1947, (61 Stat. 136 et seq; 29 U.S.C.A. Sup. I Sec. 141 et seq) hereinafter called the Act, the National Labor Relations Board, hereinafter called the Board, conducted a hearing in Los Angeles, California, on March 10, 11, 14, 15, 17, 18, 21, 22, 23 and 24, 1949, before James V. Altieri, hearing officer designated to conduct said hearing by said Board, upon the charge and first amended charge attached to the petition herein, pursuant to a notice of hearing issued by said Board. That in said hearing evidence under oath, both oral and documentary, was adduced, and an official transcript made and returned to and filed with said Board, a copy of which is in affiant's possession. That in said hearing affiant represented Los Angeles Building and Construction Trades Council and Lloyd A. Mashburn, respondents here, and that affiant was present at all times during every session of said hearing at which evidence was taken. That the statements of witnesses set forth below were made at said hearing under oath, heard by affiant and reported in said transcript; transcript references are to that transcript. The attorneys whose names appear in the excerpts are Garrett, representing the two respondents as above mentioned; Smith, Jerome, representing the Board; Binkley, representing Westinghouse; Trautman, representing Stone and Webster; Smith, William French, representing Edison; and Ryder, and White, representing the International Association of Machinists, also known as I.A.M.

Respondents' Exhibit A—(Continued)

The Board designation of this case is 21 C.D. 19, and pursuant to said hearing and after taking briefs, the Board issued its decision on May 11, 1949, a copy thereof being received by affiant on May 13, 1949. [2]

EVIDENCE RELATING TO ALLEGED UN-
FAIR LABOR PRACTICE BY WESTING-
HOUSE AND INTERNATIONAL ASSOCI-
ATION OF MACHINISTS

WILLIAM L. BUDGE

Transcript, Volume III, page 264 to 272*:

“Q. Now, with respect to the section of installation employees below the supervising engineer, would you describe the method with which these employees are selected?

A. These employees are selected directly from the local unions, depending upon the craft desired.

Q. What craft unions do you go to to arrange for the supplying of installation employees?

Mr. Binkley: Just a minute. I am wondering if you could be a little more specific. In this case or throughout the United States, or——

Mr. Ryder: We are referring specifically to the installation work at the Redondo Beach plant.

Q. (By Mr. Ryder): To which craft unions did you apply for the supplying of installation employees?

*Machinists Exhibits 1-A, 1-B, 1-C, 5-A and 5-B attached hereto as Exhibits.

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

Mr. Garrett: That is assuming a fact not in evidence. There is no evidence that this witness filled any of those positions himself.

Hearing Officer Altieri: Just a minute, Mr. Budge. You testified, Mr. Budge, it was the practice on the job to select personnel, field engineers from the local union, depending on the crafts desired or needed.

Now, did you, in order to select personnel for the installation of the turbines on the Redondo Beach project, did you or anyone under your supervision apply to local unions for personnel on that job?

The Witness: That is right.

Q. (By Mr. Ryder): Which local unions—did you apply to the Machinists Union? [3]

A. Yes, we applied to the Machinists Union.

Q. Which local was that?

Mr. Garrett: I object. In spite of his answer to this question, this witness applied to anyone for employees—his response to your question simply was that he or men under his supervision made application.

Hearing Officer Altieri: Do you want to reframe your question?

Mr. Garrett: Objected to as assuming facts not in evidence.

Q. (By Mr. Ryder): Mr. Budge, do you personally engage in the hiring of installation employees for turbine-generator installation?

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

A. On one or two instances only have I gone directly to the union. It is usually carried out by Mr. Scanlon.

Q. Does Mr. Scanlon do the hiring under your direct supervision?

A. That is right. Either Mr. Scanlon or the engineer in charge of the particular job has the authority to hire or make arrangement for the hiring of the men.

Q. Does the supervising engineer or Mr. Scanlon consult with you with respect to the hirings?

A. They consult with me as to what groups we should hire.

Q. Is one of those groups Machinists?

A. Yes, sir.

Q. Is another of those groups Riggers?

A. Yes, sir.

Q. Is another of those groups Electricians?

A. Yes, sir.

Q. Is another of those groups Pipefitters?

A. Yes, sir.

Q. Now, you testified that on one or two occasions you have personally contacted the supplying source for these groups. With respect to those occasions, that either the one or both occasions, you refer to hiring of Machinists?

A. On one occasion, yes.

Q. When was that?

A. I don't recall what occasion. It was early in 1946. [4]

Respondents' Exhibit A—(Continued)

(Testimony of William L. Budge.)

Q. Whom did you contact with respect to the supplying of labor.

A. I contacted someone in the Machinists organization, asking that we have additional men sent on the job.

Q. With respect to organization, was that a local of the Machinists Union? A. Yes, sir.

Q. Which local was that?

A. That was the Long Beach local.

Q. Do you know the number of that local?

A. No, I don't.

Q. Who was the individual that you contacted early in 1946?

A. For the specific purpose of hiring men, I don't recall who the individual was.

Q. Could it have been Mr. Floyd Smith, the business agent of the Long Beach local?

A. It could have been.

Q. Now, referring to the No. 2 House Unit, which is the unit involved in this—the start of the dispute that lead to the work stoppage—did you arrange for the providing of installation machinists on that unit?

A. No, I did not personally.

Q. Who did? A. Mr. Scanlon.

Hearing Officer Altieri: When was the work started on the installing of the unit?

The Witness: As I recall, it was January 31st or February 1st.

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

Hearing Officer Altieri: 1949?

The Witness: Yes, sir.

Q. (By Mr. Ryder): Mr. Budge, did it at any time since the installation work by Westinghouse—since the start of the installation work at Westinghouse, or by Westinghouse at the Redondo Beach plant, at any time have you discussed with Mr. Smith wages and working conditions, wages and hours and working conditions for installation machinists that would be supplied by the Long Beach local?

Mr. Garrett: That is assuming a fact not in evidence, his [5] contact with Mr. Smith.

Hearing Officer Altieri: Did you have any conversations with Mr. Smith on the subject?

A. Will you restate the first part of the question, please.

(The question was read.)

The Witness: That is, at any time, not this particular job?

Q. (By Mr. Ryder): Yes, at any time.

A. Yes, I have discussed with Mr. Smith wages and hours for Machinists at the Redondo steam plant.

Q. Do you recall when you first did?

A. There were discussions held from the time that we started in December of 1947. When we started on the first 60,000 kilowatt unit.

Q. Do you remember the substance of that conversation?

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

A. The only substance I remember was rates and hours with regard to multiple shift work.

Q. Do you remember any subsequent conversations with respect to rates and hours with Mr. Smith?

A. Yes, from time to time I have discussed with Mr. Smith rates and hours prevailing at that time or prevailing in the future.

Q. Did you at any time exchange correspondence with Mr. Smith concerning rates and hours?

A. We have received several letters from Mr. Smith stating rates and hours.

Q. Do you have those letters present with you in the hearing room?

A. I think Mr. Binkley has those letters.

Mr. Ryder: May I see those letters, Mr. Binkley?

Mr. Binkley: Yes.

Mr. Ryder: Do you have the original of this letter of December 29th, addressed to Mr. S. M. Scanlon, Mr. Binkley?

Mr. Binkley: It is in the office at Pittsburgh or Philadelphia.

Mr. Ryder: Mr. Examiner, I have here a copy of a letter of [6] December 29, 1947, addressed by Floyd E. Smith, business representative, to Mr. S. M. Scanlon, the Westinghouse Corporation. Also have a copy—evidently the original, as Mr. Binkley states, is some place in the records of the company's offices, perhaps in the east.

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

I would like to introduce a photostatic copy of this letter, the company's copy.

Hearing Officer Altieri: I don't think you laid a foundation for the introduction of the evidence. I am sure no serious objection will be urged as to the fact they are copies rather than originals.

Mr. Binkley: I am going to object to the introduction. The fact they are copies, I have no objection to that.

Mr. Garrett: I have no objection to the introduction of the letters.

Mr. Binkley: I would like to be enlightened at this time on the purpose of this offer of proof and the necessity for establishing these conversations between the I.A.M. and Westinghouse. We already testified there were conversations. I assume this is going to be an effort to prove some kind of a contractual relationship between the I.A.M. and Westinghouse.

I would like to know what the purpose and the materiality of the testimony at this time.

Mr. Ryder: Mr. Examiner, it is my intention to offer into evidence written communications between the Westinghouse Corporation and local unions, exchange of communications, for the purpose of indicating a continuing relationship——

Hearing Officer Altieri: Apparently, there is going to not be any objection predicated on the authenticity of the documents. I have heard only one, going to the materiality of them.

Respondents' Exhibit A—(Continued)

(Testimony of William L. Budge.)

May I see them?

Mr. Ryder: Yes, surely. These are communications that were addressed by the union to representatives of the Westinghouse [7] Corporation.

Mr. Binkley: I withdraw any objection to the introduction of those letters.

Hearing Officer Altieri: I was frankly going to receive them. Will you have them marked for identification."

WILLIAM L. BUDGE

Transcript, Volume III, page 274 to 278:

By Mr. Ryder:

"Q. Mr. Budge, you have testified previously that you have engaged in some conversations with Mr. Smith with respect to hours and rates, and we have introduced into evidence some communications from Mr. Smith to Mr. Scanlon and Mr. Long of your company, with respect to hours and rates.

Do you consider these conversations and these communications evidence of any agreement, at least an oral agreement, with respect to hours and rates, the International Association of Machinists, Local Lodge 1235, represented by Mr. Floyd E. Smith—

Mr. Binkley: I am going to object to that on the ground it is calling for a conclusion of law.

Hearing Officer Altieri: I will sustain the objection to the question.

Mr. Garrett: May the record show we make the same objection?

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

Hearing Officer Altieri: Yes.

Q. (By Mr. Ryder): Mr. Budge, has the Westinghouse Corporation been governed by the terms and conditions in these communications that are now in evidence, with respect to the employment of machinists from Local Lodge 1235?

Mr. Binkley: I am going to object again on the ground of the use of the phrase 'be governed.' I think it calls for another conclusion of the witness. We are perfectly willing to stand on the conversations we have had and the correspondence we have exchanged [8] with the union.

If the question is have they paid the wage rates mentioned in those letters, that are already in evidence, certainly, I will permit him to answer that.

Mr. Garrett: The question of have you been governed always calls for a conclusion. I object on that ground.

Q. (By Mr. Ryder): Have you observed and paid the wage rates and other conditions set forth in those exhibits?

Mr. Garrett: Same objection. He can't testify as to what he did with reference to a document; he can only testify about what his company did.

Hearing Officer Altieri: Overruled.

Mr. Binkley: I want to make the objection that I think this is an indirect method of getting a statement from this witness that, in his opinion, there is some kind of a contract existing between the Westinghouse and the I.A.M.

Respondents' Exhibit A—(Continued)

(Testimony of William L. Budge.)

If the Board, after hearing the evidence, the conversations between Westinghouse and I.A.M. and the letters wants to rule that in this proceeding, so far as it is concerned, there was an oral agreement, that is all right with me.

But I don't think that we should put this witness in the position of binding himself by some admission which is an admission of the company, since he is an agent of the company, and he considered this to have been some sort of a contract.

Hearing Officer Altieri: The last question was whether he as a supervisor observed these conditions, whether he lived up to the conditions contained in these letters, in the employment of the Machinists.

Is that the question?

Mr. Ryder: That is right.

Hearing Officer Altieri: I will allow him to answer. You have an exception. [9]

Mr. Garrett: The trouble with that is there is no evidence that this witness knew about these letters at the time they are dated. The bare evidence here upon which the production of these letters was permitted was that as to two of them, he had knowledge of their being in the files of Westinghouse Company. The other I think, the foundation was somewhat more indefinite than that. He can't testify——

Hearing Officer Altieri: The question is sim-

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

ply, Mr. Garrett, whether the company has, in fact, paid the Machinists in accordance with the terms that are contained in these letters.

I think the witness may answer whether he even knows the letters were in existence at the time or not.

Mr. Garrett: We want our objection noted. We think that calls for a conclusion.

Hearing Officer Altieri: You have your objection and exception.

Q. (By Mr. Ryder): Will you please answer the question?

A. To my knowledge they have been. So far as wages and hours are concerned."

WILLIAM L. BUDGE

Transcript, Vol. V, pages 333 to 335:

By Mr. Garrett:

"Q. Did you make the original labor arrangements for the installation of the first unit?

A. The Westinghouse Company did.

Q. The Westinghouse Company did?

A. Yes, sir.

Q. I presume you didn't personally make those arrangements, is that right?

A. I personally didn't make the arrangements for the men on the job.

Q. Now, your engineer on the job was D'Antoni?

A. That is right. [10]

Respondents' Exhibit A—(Continued)

(Testimony of William L. Budge.)

Q. And your supervising engineer there was Skaggs? A. Mr. Scanlan.

Q. Mr. Scanlan? A. Yes.

Q. I suppose then, so far as you know, the labor involved in the installation of the first unit was arranged for by one or the other of them, is that correct? A. That is right, sir.

Q. Did you give them any directions as to how they were to arrange to get that labor?

A. Yes, sir.

Q. Did you give them those directions as a result of any directives that had been given to you or, as a matter of your own judgment?

A. As a matter of my own judgment.

Q. In other words, you exercised your discretion in that matter? A. That is right.

Q. In the installation of the first unit, what unions did you have Mr. Scanlan or Mr. D'Antoni contact?

A. On the installation of the first 60,000 kilowatt unit I had them contact the union that represents the riggers, or iron workers, the union that represents the pipe fitters and the union that represents the machinists, and the union that represents the electricians.

Q. In other words, you had them contact the Iron Workers, the I.B.E.W., the United Association, that is, the Pipe Fitters, and the I.A.M., is that correct?

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

A. The I.B.E.W., I assume, is the Electrical Union?

Q. That is right. A. Yes." [11]

WILLIAM L. BUDGE

Transcript, Vol. V, pages 343 to 346:

"Q. Now, I think you stated the other day on your direct examination that when Mr. Barbaglia demanded that Millwrights be put on the work you were doing you told him, in effect, that couldn't be done without the consent of the Southern California Edison Company.

Mr. White: I object to that question as assuming a fact not in evidence. I don't remember any testimony of this witness that Mr. Barbaglia made any demand on him to put Millwrights on the job. I believe he called him on the phone and they had a conversation.

Hearing Officer Altieri: I will sustain the objection. I think that is true.

Mr. Garrett: No. It was in connection with the telephone conversation he had with Mr. Mashburn.

Q. (By Mr. Garrett): You told him, I believe, that the men you were using couldn't be replaced with Millwrights, at least, until you consulted Southern California Edison? Is that about what the conversation was?

A. As I recall, the conversation was something like this: That I felt I could not change the craft at the present time, unless it was—unless I was in-

Respondents' Exhibit A—(Continued)

(Testimony of William L. Budge.)

structed to by the customer, as it would impair other jobs I had in operation.

Q. For the customer?

A. Not for the customer. I didn't make that statement.

Q. What do you mean by saying it would impair other jobs you had in operation?

Q. The Southern California Edison Company is not the only company that we are doing installation work for.

Q. You are installing, in other words, equipment for other customers than the Southern California Edison Company at the [12] same time, is that correct?

A. That is correct.

Q. You feared if you hired on the Southern California Edison job to do the installation work members of any other union than the I.A.M. that the I.A.M. might undertake reprisals against the Westinghouse Company on these other jobs, is that what your meaning was?

The Witness: I would like you to state that again. Would you read it back to me?

(The question was read.)

Mr. Binkley: Is that material? I object to it on that ground.

Mr. Ryder: I object to that question. There is no foundation in the direct testimony that Mr. Budge gave concerning this implied type of information that Mr. Garrett desires of this witness at this time on cross-examination.

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

Hearing Officer Altieri: Have you gentlemen fully stated your objections?

Mr. Ryder: Yes.

Hearing Officer Altieri: The objection is overruled.

The Witness: I would like to answer that question in this manner: That you state that I could not or would not hire any other unions. But we had other unions on the job, at the present time. Other unions on the job at the present time. And as far as fear of reprisals was concerned, we have no fear of reprisals. I don't know what your meaning of 'reprisals' is. That could mean anything.

Q. (By Mr. Garrett): Let me put it this way:—

Hearing Officer Altieri: Let's not go too deeply into this. Only answer in relation to what you meant when you made that statement to Mr. Mashburn.

The Witness: I meant we had Machinists employed on other jobs [13] and that possibly action would be taken on those other jobs.

Q. (By Mr. Garrett): By the I.A.M.?

A. I didn't know who it would be by, but I disliked to start to rock the canoe in the middle of a job.

Q. In other words, it was more like this: If you replaced the I.A.M. people with Millwrights on the Southern California Edison job and started

Respondents' Exhibit A—(Continued)

(Testimony of William L. Budge.)

the procedure of replacement, you anticipated, of course, that it might be necessary to carry through the policy of replacement on the job.

Mr. Ryder: I object again to the question. We are going into quite a field of speculation on this cross-examination.

Hearing Officer Altieri: Have you finished, Mr. Ryder?

Mr. Ryder: Yes.

Hearing Officer Altieri: Overruled.

The Witness: Well, there is another point, of course, that was in my mind. Not being aware of all the intricacies of unfair labor charges, as long as I had hired a particular craft, I must have in at least my own estimation some well founded reasons for discontinuing the work of that craft, unless the work was unsatisfactory."

WILLIAM L. BUDGE

Transcript, Volume V, pages 377 to 378:

"Q. (By Mr. Garrett): Do you recall a conversation you had with Lloyd Mashburn about February 1st of this year? A. Yes.

Q. You testified about it on direct examination on Monday? A. Yes.

Q. Do you recall? A. Yes.

Q. Did you tell him that to change from Machinists to Millwrights would affect other jobs that you had going on at the time?

A. I told him that I felt a changing would im-

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

pair other jobs that I had going on at that time.

Q. And they were jobs other than the Edison job, is that right? A. That is correct.

Q. Well, did you tell him definitely that you would not replace the I.A.M. people with Millwrights, or did you tell him that you would have to talk to Edison Company about it?

A. I neither told him I would or I would not. I told him that to change labor it would have to be from a request by the Southern California Edison Company.

Q. Did you tell him you would take it up with them or was the matter just left that way?

A. The matter was just left that way."

WILLIAM L. BUDGE

Transcript, Volume V, pages 407-412.

By Mr. Garrett:

"Q. It is a fact, is it not, that throughout the installation work at the Redondo Beach steam plant, on the work in dispute between the Millwrights and the I.A.M., you hired members of the I.A.M. to do that work exclusively?

A. Well, no one has explained to me and I am not—just what work you are referring to, as to nuts and bolts and pipe and electrical connections?

Hearing Officer Altieri: Mr. Budge, don't you know the work involved in the dispute between the Millwrights and the Machinists?

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

The Witness: I don't know how far these people intend to carry this thing out.

Mr. Ryder: Mr. Examiner, we are intending to use an expert, Mr. Scanlan, for the testimony on this work, who is in direct supervision, for a thorough examination as to what the work there is a dispute about.

Hearing Officer Altieri: We are splitting hairs in relation to Mr. Garrett's question. What he is trying to find out is you [15] didn't use Millwrights, you used Machinists.

The Witness: That is correct.

Hearing Officer Altieri: You didn't use Millwrights on your installation work, did you?

The Witness: No, sir.

Q. (By Mr. Garrett): You used Machinists exclusively then, didn't you?

Hearing Officer Altieri: Well, that gets us back into the controversial aspect of it. Why don't you consider your question as to it?

Q. (By Mr. Garrett): Did you have any deal with Smith not to use any men except his?

A. No, sir.

Mr. Ryder: I object to that.

Hearing Officer Altieri: It has been answered, Mr. Ryder.

Q. (By Mr. Garrett): It just happened you didn't hire any men except from Smith to do that particular type of work?

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

Mr. Binkley: I object to that as argumentative.

Hearing Officer Altieri: Sustained.

Q. (By Mr. Garrett): Did you ever consider for the doing of any of that work of setting or installing your turbo-electric generators the hiring of any men from anyone except through Mr. Smith's union?

Mr. White: That has been asked and answered about four times; repetition.

Hearing Officer Altieri: Go ahead and answer, if you can.

The Witness: We made a decision to use a particular type of men who proved satisfactory, so there was no reason to do otherwise.

Hearing Officer Altieri: Mr. Garrett, is this further questioning in relation to the material that was brought out on redirect, or are you now launching a new cross-examination?

Mr. Garrett: It relates to the redirect. [16]

Hearing Officer Altieri: All right.

Q. (By Mr. Garrett): So you made a decision, you say, to use men supplied by the I.A.M. When did you make that decision?

Mr. Binkley: Wait a minute. Let's have the question read.

(The question was read.)

The Witness: Our using Machinists started in January or February of 1946, on prior jobs.

Q. (By Mr. Garrett): Is that when you made

Respondents' Exhibit A—(Continued)

(Testimony of William L. Budge.)

your decision to hire Machinists, members of the I.A.M.?

A. That is when we hired I.A.M. for the first time, when I hired them for the first time.

Q. Thereafter, you never hired members of any other union to do that work?

Hearing Officer Altieri: Are we going to get back in that matter? We debated a little bit before about that, Mr. Garrett. By "work" you mean the work your Building Trades Council considered Millwrights work?

Mr. Garrett: That is right.

Q. (By Mr. Garrett): Do you understand in general the work of setting and installing the machinery?

A. We have used Machinists from that time on.

Q. Did you ever communicate the fact that you were going to use Machinists only from that time on to any member of the Machinists Union?

A. No, sir, I did not.

Q. But you told Mr. Mashburn you couldn't change that practice, at least you couldn't until Southern California Edison might intervene?

Mr. Binkley: I object to that as having already been asked and answered.

Hearing Officer Altieri: Objection sustained.

Mr. William Smith: I object to it as contrary to the evidence. [17]

Hearing Officer Altieri: Sustained.

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

Q. (By Mr. Garrett): Now, I take it that in deciding to use members of the I.A.M. on that installation work you disregarded entirely the union affiliation of the other men who might be working on the job for Stone and Webster or their subcontractor?

Mr. White: I object to that.

Hearing Officer Altieri: Sustained. What are we going to start trying, an unfair labor practice case against Westinghouse, Mr. Garrett?

Mr. Garrett: Well, I think that anything that tends to show a form of collusive action between the complaining union and the complaining employer here——

Mr. Ryder: Mr. Examiner,——

Hearing Officer Altieri: Just a minute. Let him finish.

Mr. Garrett: ——might be relevant. I think it might be relevant to inquire into that.

Hearing Officer Altieri: The last previous question, I believe, was objected to and the objection was sustained. Let's carry on.

Mr. Garrett: I want to say, after all, a jurisdictional strike, the provisions of the Act are not, I don't believe, designed to assist employers to get away with unfair labor practices.

Hearing Officer Altieri: I would agree with that.

Mr. Binkley: I would like to say that if it is collusive of the employer, without any contract with

Respondents' Exhibit A—(Continued)

(Testimony of William L. Budge.)

any union, to hire what labor he thinks can best do the job, then I am afraid we will have to stipulate to it.

Mr. White: Particularly, in view of the activity of Mr. Garrett's client.

Hearing Officer Altieri: All right, gentlemen. Go ahead.

Q. (By Mr. Garrett): Did you make any inquiry whether or not there existed other sources of competent labor for doing your particular type of work? [18]

A. Of course, when we started this installation work in 1946 I checked with other manufacturers of similar equipment, to see who had been doing the work over the past number of years, which, of course, has a lot to do with what type of people you hire. To my knowledge the Machinists Union had been exclusively.

Q. Now, which other manufacturers of similar equipment did you check with?

A. Well, we checked with the G. E. Company. And we checked with Allis-Chalmers Company.

Q. Just the two? A. Yes.

Hearing Officer Altieri: Did you deny employment to anyone on this job because of his union affiliation?

The Witness: No, sir.

Q. (By Mr. Garrett): You didn't hire anybody but members of the I.A.M. on the particular work in

(Testimony of William L. Budge.)

Respondents' Exhibit A—(Continued)

dispute between them and the Millwrights, did you?

Mr. White: There is no evidence in this record to show that to be a fact; that assumes a fact not in evidence.

Hearing Officer Altieri: Don't argue it, Mr. White. If you have any objection to make, make it.

Mr. White: I object on the ground it assumes a fact not in evidence.

Hearing Officer Altieri: I will sustain the objection to the question.

Q. (By Mr. Garrett): Now did you have any conversations with any representatives of the other A.F.L. trades about the Machinists working for you?"

SAUL M. SCANLAN

Transcript, Vol. V, pages 417-433:

By Mr. Ryder:

"Q. Will you please state your name and address?"

A. Saul Scanlan. 153 Corona Avenue, Long Beach, California. [19]

Q. By whom are you employed?

A. Westinghouse Electric Corporation.

Q. What do you do?

A. Field supervising engineer. My work is in connection with the service and erecting of new machinery in the field, working out of Southern California, Los Angeles office.

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

Q. What type of machinery does that cover, Mr. Scanlan?

A. That covers Turbo-generators, heat exchangers, marine propulsion and auxiliaries and et cetera.

Q. How long have you done this work?

A. I entered the employment of the Westinghouse Company January 6, 1927.

Q. Has your employment been continuous with Westinghouse from that date until the present date?

A. There were two breaks. One time when I was on an absence of leave in 1940, until the day war was declared, as general superintendent of the Gulf Engineering Company in New Orleans.

The day war was declared I was instructed I would have to sever my relations and return. I returned as the marine supervisor for the Gulf area, working out of the Atlanta office, of Westinghouse Electric Corporation.

Q. Your war service work was with Westinghouse, as your employer, is that right?

A. That is right, except another break of nine months in 1943, I think, from about November 1943 until September, I guess it was, of '44. At such time I was assistant machinery superintendent in the Kraft Shipyards in Philadelphia, Pennsylvania.

Q. As assistant machinery superintendent, what were your duties there?

A. My duties were the erection of all machinery

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

and ordnance, guns, propulsion machinery, anything in the mechanical line. [20]

Q. Did that also include the erection and installation of turbines?

A. The erection of turbines, generators, gears and et cetera.

Q. When were you assigned by Westinghouse to the Southern California area?

A. I rejoined Westinghouse Company in November, November 1, 1944. I reported to our San Francisco office for two months, with instructions that I was to report in the Los Angeles area as soon as we had opened this office, as a district office.

Q. What about the date, about what date did you come to this Los Angeles area, Mr. Scanlan?

A. I think it was February 1, 1945.

Q. Has your work been confined to this area since February 1, 1945? A. That is right.

Q. Now, will you briefly describe your work in this area? What type of work have you done here?

A. Well, the first part of my time here was in — a big part was in connection with the marine work in the progress of the war, in the shipyards, supervising over the erecting engineers and repairs to damaged ships and machinery.

Also, central and industrial work. Industrial meaning the small machines in the industries throughout Southern California, in this area.

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

Q. What type of machines would those be?

A. They were in all cases turbines, turbo-generators, turbo-mechanical drives, condensers or heat exchangers.

Q. Were those machines in general Westinghouse products, manufactured by Westinghouse?

A. In every case they were Westinghouse products.

Q. What installation work have you done since you have been [21] in the Los Angeles area with respect to steam turbine generators in power plants?

A. The first job would be the house unit in the harbor steam plant, City of Los Angeles.

Q. Could you specify the date, if you can?

A. I would rather not, because I can't give you the exact date; I don't know.

Q. The early part of a certain year, perhaps?

A. I would say it would be 1946. I don't know, maybe March or April; somewhere in the spring, I think.

Q. How many installations were involved in this harbor steam plant?

A. How many to date at this particular time?

Q. How many to date have you supervised in the harbor steam plant since you originally started there?

A. Five units all told; two small house units rated about 4,000 kw and one rated at 65,000 kw, 3,600 rpm, tandem compound machine.

Respondents' Exhibit A—(Continued)
(Testimony of Saul M. Scanlan.)

Two 75,000, one of which is in the process of being erected at this time; 1,800 rpm, 75,000 kw rating.

Q. These were all new installations?

A. These were all new installations.

Q. With reference to the harbor steam plant, did you also supervise any repair work connected with the turbine generators? A. Yes.

Q. How many would you estimate?

A. Well, normally, we probably have three or four repair jobs going on at the same time of each erection. It varies considerably. We may have four one day and nothing the next day, and more than we can handle the following day.

Q. Mr. Scanlan, have you done any supervising with respect to the installation or repair of turbine generators in any other [22] steam power unit or plant? A. In my time with the company?

Q. In the Los Angeles area.

A. In the Los Angeles area, yes.

Q. Which was that?

A. The Redondo Southern California Edison Steam Station. Two units, one of 60,000 kw, 3,600 tandem compound machine. And one of 6,000 complete expansion quick start kw machine. We began the second unit, which is the question at bar now——

Q. By the 'second unit' you mean the second house unit concerning which this dispute is about?

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

A. I mean the second unit.

Q. In connection with the first large unit and the first house unit, did your supervision involve the period from the original installation until the completion of those units? A. It did.

Q. Calling your attention to the second house unit, did your installation assignment involve the original start of the work on that unit?

A. It did.

Q. For how long a period did your supervision on the second house unit continue?

A. It seems to me like we started to get some leveling plates around Thursday or Friday, one or two days of that week, and the machinery arrived on the plant site over the weekend, I think. We attempted—no, it had—

Q. Could you state what weekend that was, in terms of dates, if possible?

A. It seems to me like that was about January 28th; I am not too sure.

Q. Your work continued up till then, with that unit?

A. Until a Tuesday, that is—no. On a Tuesday I was [23] called to the plant site. Our work continued about a week on after that Tuesday, I would say, following.

Mr. Binkley: What year are we talking about?

Hearing Officer Altieri: Do you want to fix dates

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

you think he may have trouble with? Why don't you show him that calendar?

Q. (By Mr. Ryder): I have a calendar here, Mr. Scanlan. Were you in the hearing room here when there was some testimony given as to the start of the installation work of the second house unit on January 31, 1949? A. Yes.

Q. To your recollection could that be the date that your supervision, your supervisory work started on that second house unit?

A. Well, my work is lots of preliminary work that enters into it. I was speaking of my actual work, rather than the erecting engineer's time, when he starts.

I may visit a plant site and discuss the job with the people charged with the responsibility. But in the main, before I assign the engineer to do the job with the men and materials—it is all preliminary, so when he comes he can go ahead with his job.

Q. Does your preliminary work prior to the actual start of the installation involve the hiring of crafts employees to do the installation work?

A. It does.

Q. Directing your attention now to the first unit, which I believe was the 60,000 kilowatt unit, when did you start making arrangements for the hiring of employees for that installation work?

A. Well, if you consider the preliminaries would

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

be on the completion of the second unit in the Harbor steam plant, which was completed, I would estimate some four or five months, [24] maybe, before, at such time our preliminaries were with the Machinists to check the tools, tools damaged, to give us a list and what we would require, and what they thought we should require so we might get prepared and be ready to begin the erection of the Redondo machine on its arrival at the site.

Q. Could you place that in terms of date, if possible, Mr. Scanlan? Perhaps we can determine something by terms—when did the actual installation work start on the first unit?

A. That started about November, sometime the first of November. It seems to me—

Q. Of what year? A. '37.

Q. 1947, you mean? A. '47.

Q. At that time did you contact unions with respect to employing the help, employees that would be necessary to the installation work?

A. I think some three or four weeks before the actual erection of this unit started I either called Mr. Smith or met him on a job site somewhere and appraised him of the fact that we intended to begin this job as soon as material arrived, and that I would require men of certain qualifications.

I asked him to keep his eyes open and try and have those men available at that time.

Respondents' Exhibit A—(Continued)
(Testimony of Saul M. Scanlan.)

Q. That would be sometime in November of 1947, would you say?

A. That would be somewhere around in October, I would say.

Q. What did Mr. Smith say at that time?

A. He told me I should have the most of the former men who had worked with me, who had expressed a desire to come back on a job, and if there was any changes they were glad to make them for me. [25]

Q. By 'former' men who did you mean?

A. Former machinists.

Q. Who had worked with you where?

A. On the harbor steam job. That is, the City of Los Angeles plant.

Q. Had you contacted Mr. Smith or anybody from the Machinists Union with respect to hiring Machinists for the harbor steam installation?

A. Yes, on the first unit.

Q. When was that?

A. It was in the spring of 1946 sometime, I think.

Q. How did you make that contact, Mr. Scanlan?

A. As I recall, a Mr. Drew was our steam supervisor in Mr. Budge's position at that time.

I made a call to the Machinists Local and made an appointment with Mr. Smith to go in and talk to him.

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

The idea was at the time we, knowing we were going to have this machine to erect, as the machine was sold sometime previous, labor costs had risen and we were trying to get the best qualified man to do the job in the smallest and shortest time.

Working on that assumption, we needed Machinists. The natural presumption was to go to the Machinists local for that man, that class of man.

Q. Do I understand you and Mr. Drew—

A. Yes.

Q. —met with Mr. Smith, is that right?

A. That is right; in the local.

Q. Did you describe to Mr. Smith the type of men you needed? A. We did.

Q. Did Mr. Smith say he could supply those type of employees?

A. He said he could supply—he had those men available and could supply them. [26]

Q. Did he supply those employees?

A. He did.

Q. For all the units in the harbor steam plant, you have previously mentioned?

A. All the harbor steam units or any of the erecting jobs in this local vicinity. That would be Redondo and harbor steam plants.

Q. Now, referring you again to yours and Mr. Drew's first meeting with Mr. Smith, did you at that time discuss hours and rates of pay?

A. We most certainly did.

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

Q. Have you at any time since that date discussed with Mr. Smith hours and rates of pay?

A. Yes, I have, on various occasions. I think there were two raises since 1946, at which time we discussed these increases. I informed Mr. Smith at his local to write a letter to that effect, and if the prevailing wage in this locality was being paid by other people doing the same work we had no other alternative but to comply.

Q. Did Mr. Smith supply those letters, to your knowledge? A. He did.

Q. I would like to show you copies of letters of Machinists Exhibits 1-A and 1-B, and ask if these are the letters you are referring to?

A. That is one letter (Indicating).

Q. That is one? A. That is one.

Q. That is 1-B.

A. This is another one, 1-A.

Q. 1-A is another one.

A. I knew of this letter, but I didn't receive a copy (indicating). I knew it was coming through. I think it came through at my request.

Q. That is the letter Exhibit 1-C, addressed to Mr. Long of [27] the accounting department?

A. Yes. I think it was at my direction it was mailed to Mr. Long.

Q. Your relationship with Mr. Smith, has it been a continuing one from your first contact when

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

you and Mr. Drew met with him, up to the present time, in terms of supplying labor?

A. It has been.

Q. Has it been a continuing one in terms of adjustments with respect to rates and hours?

A. It has been.

Q. Now, Mr. Scanlan, did any representative of any labor organization, other than the Machinists Union ever contact you with respect to your employing members of those organizations on that Redondo steam plant installation?

A. Other than the normal trades or crafts that we normally use, namely, Machinists, the Pipefitters, Riggers, the Electricians.

Q. Did the Pipefitters Union ever contact you with respect to requesting the work being done by the Machinists, to be reassigned to them?

A. No.

Q. Did the Ironworkers Union ever make such a request? A. No.

Q. Did the Electricians Union make such a request? A. No.

Mr. Binkley: I object to these questions. I think they are irrelevant and immaterial.

Hearing Officer Altieri: All right. I suppose he is done with them now. I think he is trying to anticipate something, Mr. Binkley. I am not sure. Go ahead, Mr. Ryder.

Q. (By Mr. Ryder): Did any union make any

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

request with respect to the work being done by the Machinists Union?

A. Except the case we are discussing here now.

Hearing Officer Altieri: What month of this year and what week? [28]

Q. (By Mr. Ryder): Are you referring now to the second house unit?

A. I am referring to the second house unit.

Q. There was a request by some other organization with respect to the second house unit?

A. The request was put in by way of a telephone message to me at the harbor steam plant, by our erecting engineer, Mr. Paul D'Antoni, regarding some anticipated labor trouble.

Q. What date was that, do you remember? The installation was started on January 31st.

Hearing Officer Altieri: By looking at a calendar, will it help you?

Q. (By Mr. Ryder): Will looking at a calendar help you, Mr. Scanlon?

A. It might. I would say that would be February 2nd.

Q. Do you remember the work stoppage took place with respect to the second house unit?

A. I arrived on the plant site——

Q. No, Mr. Scanlan, February 2nd, previous testimony has elicited that February 2nd was the date of the work stoppage. I wanted to know about what time prior to the work stoppage did you first

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

have information about a claim for machinists' work on the second house unit?

Mr. Garrett: In other words, any answer is all right, so long as it is one of two dates; 1st or 2nd.

Mr. Ryder: Mr. Garrett can object if he wants. I will rephrase my question, if it will help.

The Witness: I will have to answer your question by stating I drove over to the plant site somewhere about 1:00, 2:00 o'clock in the afternoon. Whereupon, I met our erecting engineer, Mr. Paul D'Antoni, out in the yard and instructed Mr. D'Antoni what was taking place. He informed me briefly that some of the other [29] trades were going to walk off the job, unless the Machinists were taken off.

Whereupon, I asked Mr. D'Antoni to accompany me to Mr. Sheets' office or Stone & Webster. On arriving in his office I was greeted by Mr. Sheets, who said to Mr. Barbaglia—

Q. Who is Mr. Barbaglia?

A. He told me he was the business agent of the Carpenters, Millwrights Local.

Hearing Officer Altieri: Local 1607? Do you know, Mr. Scanlan? Is that Local 1607?

The Witness: I don't know the number.

Q. (By Mr. Ryder): It is, as a matter of fact.

A. He addressed me by saying, 'Here is the man you want to talk to.'

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

He says, 'What are you going to do about the Machinists on the job?'

Q. (By Mr. Ryder): Mr. Barbaglia was talking to you?

A. Mr. Barbaglia was talking to me, yes. I answered him by saying I didn't know. I had no idea what he was referring to, in the first place.

I said, 'The Machinists are men who have worked with us, who have proven themselves qualified to do this type of work, and until and at such time as I am instructed otherwise, they shall continue.'

Whereupon he says, 'You can settle all this by taking those two machinists out, because they are keeping six hundred of our other men off the job.'

I told him that was no consideration of mine, that we were keeping anyone off the job. He could go ahead with his work.

Then he says, 'We will get those fellows to change their union affiliation.'

I said, 'I have no authority as part of the management to tell [30] an employee what union he belongs to.'

I said, 'If you wish you may try.'

He says, 'Do you think it can be done?'

I said, 'No, I don't. It is my understanding that one you are complaining about has been or is the past president of the Machinists Local.'

Q. Machinists Local, which one was that, Mr. Scanlan? Was it the home of Mr. Smith?

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

A. He is the head man; I had reference to Mr. Merritt.

Q. Was there anything else said by Mr. Barbaglia at that time?

A. Mr. Barbaglia said he had no other alternative but to stop the job, he was going to have a slow down now—and I asked him——

Q. What job was he referring to?

A. He was referring to the Redondo No. 2 House Unit.

Q. Was there any other occasion that Mr. Barbaglia talked with either you in person or on the telephone concerning this, the second house unit?

A. No, there wasn't."

SAUL M. SCANLAN

Transcript, Vol. V, pages 475 to 478:

"Q. (By Mr. Garrett): It is the skills involved that you described to be those of the machinists? It hasn't been the affiliation of the men that exercise those skills, isn't that right?

A. That is right. If you talk about the mechanical line, the man must qualify as a machinist in order to be able to do that work properly.

Now, if he changes affiliation, that is something else, I don't know.

Q. If he has those skills it doesn't matter whether you call him a machinist or a millwright; in your estimation he is doing what in your estimation you call machinists work? [31]

Respondents' Exhibit A—(Continued)
(Testimony of Saul M. Scanlan.)

A. As long as he is qualified.

Q. That has to do with the assembling of these machines, the assembling of the parts?

A. That is right.

Q. Now, when you test these machines on the test run, you say that you use all of the various crafts that you employ to do parts of that work.

A. I also say one reason is anticipation that should anything happen and we laid off all our different crafts and some part of the machine was not functioning the way we wanted it, we would have to rehire; maybe the man would go somewhere else and be employed elsewhere. We wouldn't get back the same men and not get the same efficiency. We would rather take a little loss for a few days, until we are satisfied the machine is going to do what we expect it to do.

Q. So you will have the men there to make repairs in case repairs are to be made, is that right?

A. That is right.

Q. Well, that is the same general situation, if the testing is done in your eastern plant, except there you have the men on the payroll all the time, is that correct?

A. I would say that is right.

Q. What is your age, sir? A. My age?

Q. Yes. A. 44.

Q. And you have been with the Westinghouse Company for how long? A. 22 years.

Q. Now, your employment of men on this work,

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

as I take it, your employment of men on the Redondo Beach plant followed the pattern you had set in employment of men on the City Harbor steam plant, is that right? [32]

A. That is right.

Q. You have already had one similar installation in that Harbor steam plant, is that correct?

A. That is right.

Q. You made your contacts with the unions at the start of the Harbor steam plant, is that right?

A. Yes, I would say so.

Q. You already had those union contacts made before the Redondo Beach work began?

A. That is right.

Q. Now, you got in touch with Mr. Smith of the Machinists Union then through your steam engineer?

A. The foreman, I think, made the contacts. Mr. Budge and myself, I think, we were together and made the contacts for the foreman. The selection of the men themselves was left—and is generally left to our foreman of each trade; feeling that they have to work for this foreman and if he puts on the men that he knows and they know that they are responsible to him we get the better class of work out of them.

Q. Was either one of the machinists working for you at the time of the shutdown on February 2nd, in 1949, a foreman?

Respondents' Exhibit A—(Continued)
(Testimony of Saul M. Scanlan.)

A. He had been, yes. Yes, he was a foreman on that job, and he had been a foreman on some of our previous larger jobs.

Q. So at the time of the work stoppage in 1949 you had, so far as machinists were concerned, one foreman working and one journeyman, is that right?

A. That is right; and two riggers."

SAUL M. SCANLAN

Transcript, Vol. V, pages 481-491:

"Q. Well, now, your company, at least, so far as installation is concerned, has no union policy, I take it, from what you tell me?

A. Are you referring to this locality and this outside—[33] what we call the field erection work now?

Q. Yes.

A. No. So far as—we have no union affiliation.

Q. You are free to hire any men you deem qualified, without respect to their union affiliations, is that right?

A. Free in this respect: With the consent of my superior, before we put men on, usually I would discuss it with my superior and we would formulate our plans, and if he has any objections he will say so at that time.

Q. But, as far as you know, there is no policy which would prevent you from using qualified men, regardless of union affiliations?

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

A. As far as I know, no.

Q. Or using men who had no union affiliation whatever? A. That is right.

Q. You sometimes do that, I take it, sometimes you call the union for men?

A. Well, I don't particularly care what local he may belong to, as long as he is qualified for that job. Naturally, I am not going to put in—if I am working machinists, I am not going to bring in a man from another local, which will cause some dissension among the men I already have. But as far as the man himself is concerned, if he is qualified it would make no difference to me.

Q. So that when it comes to the performance of your work, every installation, it is not a matter of any importance to you whether the men are working for the general contractor on the plant or for the subcontractor, whether they have any union affiliations or not, is that right?

A. That is going to depend on how the contract is let, what our responsibilities would be. If the contract was let to deliver and erect, then that means that we have to supply the labor. My superior would tell me, 'You have so much money to do this work at a certain time.' [34]

Normally, I would try to get the most skill, the best efficient men I could to do that, to meet those conditions.

Q. I understand that when you sell a piece of

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

equipment and supply merely supervision, you have no problem as to the employment of labor?

A. That is right.

Q. I am talking about the cases where you are to handle the installation. You take into account in those cases the question of whether or not the employees of the general contractor, working alongside your men on the job, have union affiliations or not?

A. No, sir.

Q. It is a matter of complete indifference to you?

A. That is right.

Q. And to your company?

A. So long as the men will do the work, he is willing to pay the money; if it isn't right, they will redo it until we are satisfied the job is right. But the men that he puts on the job will be his responsibility.

Q. Now, in view of that situation, we have on the other hand the fact that when you had to look for installation men, the first thing you did was to go to Mr. Smith, is that not correct?

A. That is right.

Q. Mr. Smith of the I.A.M. A. Yes.

Q. You went to him at whose instance?

A. Probably my own.

Q. Suppose you tell me actually what happened.

A. If I remember, when we began to put in the first house unit down in the Harbor steam plant, and when it became known that we would supply

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

the labor, Mr. Drew and myself discussed the matter and we sat down and figured out what class, what trades of men we would need, the different trades. [35]

We would need so many men to assemble this turbine and generator and so many on the pipe and the riggers. So the natural assumption, when it came to the mechanical line, was to go to the Machinists and ask them if they could supply us with those men. Probably some influence might have been—because of the fact the No. 1 unit at the Harbor steam plant was installed with the customer's labor and with the customer's machinists. We had no other alternative for the other trades, the Pipefitters or the Riggers. There was just no one else to go to, so we requested men from them and obtained them.

Q. But you had not an alternative as to men to do the work you call machinists' work, as between different unions, did you not?

A. If we knew it, it didn't register in our minds at the time. The first contact we made was with the Machinists, and he had the men qualified to do our job, and we never looked around. We never shopped around.

Q. I submit to you, Mr. Scanlan, that is not a correct answer.

Mr. Binkley: I object to that.

Q. (By Mr. Garrett): I have pointed out to

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

you that at the time that you first approached Mr. Smith you did have a choice of two places where you might apply for men with the skills——

Mr. Ryder: I object.

Q. (By Mr. Garrett): ——you had in mind. Now, I ask you, did you know that at the time you first went to see Mr. Smith?

Mr. White: I object to the question.

Mr. Ryder: I object to that as no foundation being laid with respect to any choices.

Hearing Officer Altieri: You made a statement for the record. Then you asked him a question, Mr. Garrett. I am not entirely sure how much of it was contained in the statement that [36] was actually in the question. I think I will have to sustain the objection to the question on the form, at least.

Q. (By Mr. Garrett): Were you here during Mr. Budge's testimony? A. Today?

Q. Today. A. Yes.

Q. You heard Mr. Budge say that you didn't know whether or not the Machinists were in the American Federation of Labor?

Mr. Binkley: This is purely argumentative, if the Court please. I am going to object to it on that ground, so far as he has gone already; it is clearly argumentative.

Hearing Officer Altieri: Let him finish the question.

Respondents' Exhibit A—(Continued)
(Testimony of Saul M. Scanlan.)

Q. (By Mr. Garrett): Were you similarly ignorant to that?

Mr. Binkley: I object.

Hearing Officer Altieri: I will sustain the objection. I think it takes us a little bit afield, Mr. Garrett.

Mr. Garrett: All right.

Q. (By Mr. Garrett): At the time you went to see Mr. Smith at the start of your work on the Harbor steam plant, did you know that the Machinists were not in the American Federation of Labor?

A. No.

Q. When did you find that out?

A. I hadn't given it a thought until it was brought to my attention, oh,—I don't know; I don't know when it became—

Hearing Officer Altieri: May I inquire what the purpose of this line of questioning is, Mr. Garrett?

Mr. Garrett: Certainly. He has testified on direct as to the manner in which he procured the men.

Hearing Officer Altieri: Yes.

Mr. Garrett: That apparently is one of the points made by the petitioners here, that the employer in exercising a choice to some extent exercises an influence upon determining jurisdiction, for [37] purposes of this dispute.

Hearing Officer Altieri: Yes.

Mr. Garrett: At least, I think I have the right

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

to inquire into the knowledge he had at the time he did these acts. So that we can see what he intended by his actions. It is obviously one thing, if he believes he is hiring A.F.L. men and quite another if he is ignorant of that fact.

Mr. White: I object to the question on the grounds it presents nothing relevant to this dispute.

Mr. Binkley: I don't think the intention of the employer is relevant. I think if there is any relevancy it is in acts of the employer, rather than the intent that is back of the act. I think we are getting too far away from any relevant testimony.

Hearing Officer Altieri: I think it has a very remote bearing. I will allow the question.

Mr. White: I have the further objection that I don't think this witness is competent to testify on the status of the machinists as of today.

Hearing Officer Altieri: If I am correct, I don't think there is any question pending. I think the last question he asked and I inquired of Mr. Garrett what his purpose was of the line of questioning——

Mr. Garrett: I think the question was when, if at all, he found out the Machinists were in the A.F.L.

Mr. Binkley: That has been asked and answered. He said he didn't know.

Mr. Garrett: He said he didn't know at the

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

time he went to see Smith, and I am asking him when he did find out.

Hearing Officer Altieri: That is the question he wants to ask now. When did you find out the I.A.M. was no longer with the A.F.L.?

The Witness: I was told by some of the workmen at some stage; [38] I don't know the time.

Mr. Binkley: Wait a minute. Just answer the question. Did you ever find out? Answer yes or no. Did you ever find out?

The Witness: Yes.

Q. (By Mr. Altieri): Now, when?

The Witness: When did I find that out?

Mr. Binkley: Now, if you know.

Hearing Officer Altieri: When did it come to your attention? Let's put it that way. Fix an appropriate time, so we can finish with this line of questioning.

The Witness: About the time of the No. 2, 65,000 unit in the Harbor steam plant, which would be sometime in '47, I don't know just when.

Q. (By Mr. Garrett): When was that with relation to the installation of the No. 2 unit, the 6,000 kilowatt unit in the Redondo Beach plant?

A. About a year.

Q. About a year before?

A. A year before.

Hearing Officer Altieri: Did you go to the Machinists Lodge for your men because they either

Respondents' Exhibit A—(Continued)
(Testimony of Saul M. Scanlan.)

were or were not connected with the A.F.L.?

The Witness: We never gave that one thought.

Hearing Officer Altieri: In view of that answer, I am going to sustain any objection to any further questioning along this line, Mr. Garrett's just wasting time.

Q. (By Mr. Garrett): Now, at the time then that you installed the No. 2 unit in the Harbor steam plant, had you at that time undertaken the installation of your first unit? Had you begun the installation of your first unit at the Redondo Beach plant?

Mr. Binkley: I object. That is along the same lines to which you just sustained an objection. [39]

Hearing Officer Altieri: Let's see if it is. Let's let him answer.

The Witness: We had not begun the erection of that Redondo unit.

Q. (By Mr. Garrett): Now, did you ever talk to Mr. D'Antoni about any conversations he had or did Mr. D'Antoni tell you about any conversations he had with representatives of the A.F.L. unions prior to January or February, 1949?

A. It seems to me like he mentioned once or twice having talking to some members, but I don't know the locals or what their affiliations or their positions were.

Q. Did he ever tell you about the things that

Respondents' Exhibit A—(Continued)

(Testimony of Saul M. Scanlan.)

were causing the trouble, which lead to the work stoppage in 1948?

A. Yes, it was kind of brief and it is still hazy; something about the electricians. It seems to me like he told me the Electricians claimed the erection of this machine.

Q. Did you go down there at the time of that work stoppage?

A. The following day. I don't think I went down that day. It seems to me like I was busy somewhere and I didn't get the call.

Q. Did you talk to any of the union representatives at that time? A. I did not.

Q. You made no attempt to familiarize yourself with the cause of the trouble? A. I did not.

Q. You made no adjustments as a result of the trouble? A. I did not.

Q. Or changes in your hiring policy?

A. That is right.

Q. Your hiring policy continued to be to hire the men on what you called the machine work exclusively from the Machinists?

A. That is right. [40]

Q. That had been your hiring policy on that type of work ever since the start of your work on the Harbor steam plant built by the city?

A. That is right.

Q. Did you ever hire anyone in that type of work from the time of the start of your work on

Respondents' Exhibit A—(Continued)
(Testimony of Saul M. Scanlan.)

the harbor steam plant, except from M. Smith's lodge of the Machinists?

A. For the mechanical work?

Q. That is right. A. I did not. [41]

FLOYD E. SMITH

Transcript, Vol. VI, pages 620-1

"The Witness: Floyd E. Smith. 2315 Adriatic Avenue, Long Beach.

Q. (By Mr. Ryder): What do you do, Mr. Smith?

A. Business representative of Local Lodge 1235, International Association of Machinists.

Q. How long have you been business representative? A. Since January of 1946.

Q. Are you the only business representative of that lodge? A. At this time I am.

Q. What do you mean by "at this time?"

A. During '47 and '47 I had two assistants.

Q. What are their names?

A. In '46 John R. Herd and Luke M. Moore. In '47 it was John R. Herd and Robert N. Crichton.

Q. Are you an elected business representative of Lodge 1235? A. I am.

Q. What type of Lodge is 1235?

A. Journeymen and Helpers, Local, known as a contract lodge."

Respondents' Exhibit A—(Continued)

FLOYD E. SMITH

Transcript, Vol. VI, pages 623-630:

“Q. (By Mr. Ryder): Mr. Smith, have you personally referred erection machinists to the Westinghouse Corporation for the Redondo Beach plant?

A. Many times, yes.

Q. Have you personally referred erection machinists for the installation work of the General Electric Company at the Redondo Beach plant?

A. Yes.

Q. Now, directing your attention to the referrals to the Westinghouse Electric Corporation for any of their installations in the Southern California area, when was the first time that a connection was made between Westinghouse and your lodge in terms of such referrals? [42]

A. The latter part—rather, in the month of December of '45, or first part of January '46.

Q. Would you describe that first contact? Who made it?

A. Mr. Scanlon and Mr. Drew, both from Westinghouse Company.

Q. Who is Mr. Drew?

A. At that time, I believe, he held the same position as Mr. Budge holds at the present time; field steam supervisor.

Q. He was the predecessor of Mr. Budge, is that right?

A. That is right.

Q. Did Mr. Scanlan and Mr. Drew call you?

A. They contacted the office of the local. I am

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

not sure whether they talked to myself or our grand lodge representative, T. E. McShane, who was there at the time.

Q. Would you remember which man, either Mr. Scanlan or Mr. Drew, who made that call or contact, as you described it?

A. I believe it was Mr. Scanlan.

Q. What did he say?

A. He asked for an appointment or if we could meet to talk over the arrangements for machinists to do some installation and erection work at the Harbor Steam plant.

Q. Did you give them an appointment?

A. We did.

Q. When did you meet?

A. Well, I don't recall whether it was that afternoon or a day or so later we met with them.

Q. Where did you meet?

A. In the office of Lodge 1235.

Q. Who was present for the Westinghouse Corporation at that meeting?

A. Mr. Scanlan and Mr. Drew.

Q. Who was present for Lodge 1235 at that meeting? A. Mr. McShane and myself. [43]

Q. Who was Mr. McShane?

A. A grand lodge representative of the International Association of Machinists.

Q. What was said about the Westinghouse representatives at that meeting?

Hearing Officer Altieri: Give us the substance of

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

the entire conversation, so far as you recall it, what they said to you and what you said to them.

The Witness: They first outlined the type of equipment or notified us that they had a turbo-generator to be erected at the Harbor steam plant.

They asked us if we had men qualified to do that type of installation and erection work.

We told them that we knew we had the men and could supply them, because we had several members who had worked in the shipyards on erecting turbo-generators in ships, in all of the shipyards; that was under a Metal Trades agreement which the Machinists were a party of.

Q. (By Mr. Ryder): With respect to that installation, were some of those Westinghouse turbines, do you know? A. Yes, they were.

Q. Would you go on, please.

A. Also, knowing that we had members who in past years had worked on the installation, erection of steam turbine generators in various parts of the country, we then discussed hours and wages and working conditions.

It was agreed at the time necessary that Mr. Scanlan would notify us of the number of men he would need on the job or require for the job.

It was approximately the middle of September that we supplied——

Q. Is that the substance of that?

A. The substance of that. [44]

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

Q. The substance of that particular meeting?

A. Yes.

Q. Did you subsequently supply men to the Westinghouse Corporation? A. We did.

Q. For the Harbor steam plant?

A. That is right.

Q. Did you have any other meetings with Mr. Scanlan or Mr. Drew or any other representative of Westinghouse—

Mr. Garrett: Just a moment. I beg your pardon.

Q. (By Mr. Ryder): —prior to the start of that supplying of that labor?

The Witness: Not to my knowledge.

Mr. Garrett: May I have the previous question and answer read?

(The record was read.)

Q. (By Mr. Ryder): When did you first start supplying machinists for the Harbor steam plant?

A. Approximately the middle of January 1946, on their first house unit.

Q. How many Westinghouse units did you supply men for the Harbor steam plant? Would you approximate that figure?

A. Supplying for the fifth unit at the present time. I believe their fifth unit is being erected at the Harbor steam plant, and we are supplying the men.

Q. Do you know how many Westinghouse large

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

units you supplied men for at the harbor steam plant?

A. To the best of my knowledge this is the third one, at the Harbor steam plant.

Q. How many house units at the Harbor steam plant, Westinghouse house units? A. Two.

Q. With respect to supplying those men for those units you have just referred to, did you do all of the dispatching of the men for the work?

A. No.

Q. Did you do the majority of the dispatching?

A. The majority of it. I might answer that this way: That most all calls in for men are taken from an out-of-town book, which we have classified under the headings of shop machinists, which is a machinist that has most of his time or all of his time, after he has learned the trade, in a machine shop.

Another section in the Diesel repair, which that machinist or journeyman has followed, the Diesel end of the trade.

Marine Machinist is the member that has followed the marine end. And the erection men who have followed the erection end of the trade.

If I am not there to receive the call, and if the men are to be dispatched at once, Mr. Carl James, who is our financial secretary, will dispatch for me, by signing my name by him, with initials.

If the men are not to be dispatched until a day

Respondents' Exhibit A—(Continued)
(Testimony of Floyd E. Smith.)

or so later, they wait until I come in to dispatch them to the job.

Q. Is there anybody else besides Carl James and yourself that does such dispatching?

A. Yes. In '46 the two previous assistants that I named, John Herd and Luke Moore, dispatched, and at that time we also had a dispatcher for the first part of '46; his name is Guy M. Brunkman.

Q. Were all those dispatches done under your general supervision, if you did not do it yourself?

A. That is correct.

Q. Since January of '46?

A. That is correct.

Q. Now, with respect to your practice in terms of dispatching, do [46] you attempt to send men to employers who have employed these men on previous jobs? A. Always.

Q. Did you do that with respect to the Westinghouse installation at the Harbor steam plant?

A. That is right.

Q. Did Westinghouse or any representative from Westinghouse Electric Corporation report to you any dissatisfaction with the men that you sent them for work at the Harbor steam plant?

A. Never.

Q. Are you still supplying men for Westinghouse at the Harbor steam plant? A. I am."

Respondents' Exhibit A—(Continued)

FLOYD E. SMITH

Transcript, Vol. VI, pages 631-4:

“Q. Now, Mr. Smith, directing your attention to the Westinghouse installations at the Redondo Beach plant of Southern California Edison Company, were you contacted by any representative of Westinghouse Electric Corporation, with respect to the supplying of labor for the installation of the first Westinghouse unit in that plant?

A. Yes. I might state in this matter of having a job just completed or being under work at the present time—just prior to the starting of the job, stating that it was going to be started.

Q. Who contacted you?

A. Well, I believe Mr. Scanlan.

Q. Had Mr. Scanlan contacted you earlier with respect to the Harbor steam plant, in the supplying of labor? A. That is right.

Q. Around what date was that? When this contract was made?

A. Will you repeat just what unit you are talking about, which job?

Q. I am referring to the first unit of Westinghouse, the No. 1 unit at Redondo Beach. [47]

A. The job was started the latter part of November of 1947 or the first part of December 1947. Sometime prior to that I was notified by Mr. Scanlan that the unit was being shipped. I am just trying to recall whether we had anybody working on any other job at the time or not. I don't believe

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

we did have; and stated that Mr. Skeegan, or asked if Mr. Skeegan, which is one of the machinists and a working foreman for Westinghouse, would be available for that job.

Q. Mr. Skeegan is a member of Lodge 1235?

A. He is.

Q. What did you say?

A. Yes, that he would be available and would go to work.

Q. What was the substance of the entire conversation during that first contact made by Mr. Scanlon? What did he say, what did you answer and what arrangements did you make, in other words?

A. If I recall right, it was approximately around that time that we were discussing increase in wages, and I believe we talked some of the increase and what date it would be started or be granted by the company.

There was never very much conversation on supplying men to any of the jobs after the first contact.

Q. Was that generally handled for Westinghouse by somebody, other than Mr. Scanlan and Mr. Budge?

A. Most of the time those two, after the first original contact.

Q. Would they contact through Mr. Skeegan to you for subsequent referrals?

A. They have. Mr. Skeegan has called me and

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

stated they needed an extra man or two on one of the shifts, or other.

Q. Did you supply the men for the first unit, is that correct? A. That is correct.

Q. Did you supply men for the first Westinghouse unit? A. That is correct.

Q. Did you supply installation mechanics for the second house unit? [48]

A. At the Redondo plant?

Q. Yes. A. I did.

Q. The one that the dispute finally came to a head about? A. I did."

FLOYD E. SMITH

Transcript, Vol. VI, pages 634-48:

"Q. From the time you started supplying men for the first house unit to the time when you were supplying Mr. Merrit and Mr. Sinclair for the second house unit—I mean the first big unit, until the time of the second house unit, did you have various dealings with the Westinghouse representative in terms of adjustments in wages and rates of pay and hours?

A. Yes. I believe it was—a wage adjustment was made after the starting of the big unit or known as unit No. 1 at the Redondo plant.

Q. Were generally these adjustments made orally?

A. As a rule, they were discussed between Mr. Budge, Mr. Scanlan and myself, and I wouldn't

Respondents' Exhibit A—(Continued)
(Testimony of Floyd E. Smith.)

always say that there were letters of confirmation going on them; sometimes we did.

On the two occasions when I can recall that we confirmed the conversation by letters.

Mr. Ryder: Will you mark this for identification.

(Thereupon the documents above referred to were marked Machinists' Exhibits Nos. 5-A and 5-B for identification.)

Q. (By Mr. Ryder): Mr. Smith, I hand you Machinists' Exhibit for identification 5-A, which is a letter over the signature of Mr. William L. Budge, dated July 27, 1947, and ask you to inspect that document.

A. (Witness complies.)

Q. Are you familiar with that document?

A. I am. [49]

Q. Is that one of the communications you previously referred to with respect to adjustments on rates of pay and hours of work? A. It is.

Mr. Ryder: I offer Machinists' Exhibit 5-A for identification into evidence. I would like to point out here on the record, Mr. Examiner, that the original has some extraneous material written on it. We don't know by whom. That has no reference to the body of the letter.

I do have photostatic copies of this communication, which excludes this material.

Hearing Officer Altieri: Show it to Mr. Garrett.

Mr. Ryder: Do you want to look at it first?

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

Hearing Officer Altieri: Show it to Mr. Garrett first.

Is there any objection to the introduction in evidence of this document?

Mr. Garrett: No objection.

Hearing Officer Altieri: It will be received.

(The document heretofore marked Machinists' Exhibit No. 5-A for identification was received in evidence.)

Mr. Ryder: We will keep the original. Seemingly, we agreed to that previously on other exhibits.

Q. (By Mr. Ryder): Mr. Smith, I hand you Machinists' Exhibit for identification 5-B, and ask you to inspect that document.

(Witness complies.)

Q. Is that one of the documents referring to the rates and hours of work you previously testified to? A. It is.

Mr. Ryder: I offer Machinists' Exhibit 5-B into evidence. I will show it first to Mr. Garrett.

Hearing Officer Altieri: I take it there is no objection to this document?

Mr. Garrett: No objection. [50]

Hearing Officer Altieri: It will be received.

(The document heretofore marked Machinists' Exhibit No. 5-B for identification was received in evidence.)

Q. (By Mr. Ryder): Mr. Smith, I hand you

Respondents' Exhibit A—(Continued)
(Testimony of Floyd E. Smith.)

Machinists' Exhibit 1-A, 1-B, and Exhibit 1-C, and ask you to inspect those documents.

(Witness complies.)

Q. Are you familiar with those documents?

A. I am.

Q. Are those documents part of the correspondence with respect to rates and hours dealing with the Westinghouse installation? A. They are.

Q. Mr. Smith, would you briefly describe what basic Lodge 1235 use for the purpose of establishing the rates of pay that you did establish with the Westinghouse Corporation on those jobs?

Mr. Binkley: I object to that as being irrelevant and immaterial.

Mr. Garrett: We make the same objection.

Hearing Officer Altieri: I will sustain the objection. What is the materiality of it, Mr. Ryder?

Mr. Ryder: I wanted to show through Mr. Smith the methods in which the rates were reached, in terms of the timing of the adjustments, because of no continuing written contract with the Westinghouse Electric Corporation for this installation work.

Mr. Binkley: If it is stipulated, Mr. Ryder, there was no contract with Westinghouse, I will withdraw my objection.

Hearing Officer Altieri: Mr. Garrett, has an objection, too.

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

Mr. Garrett: We think it is incompetent, irrelevant and immaterial.

Hearing Officer Altieri: I think so, too. I am going to sustain the objection.

Mr. Ryder: I will drop it. It is not too important.

Q. (By Mr. Ryder): Mr. Smith, directing your attention again to the installation work at the Redondo Beach job, when was the first time [51] that you heard—or did you hear of any claims by any other labor organization, other than Machinists Union, concerning the machinists' work on the Westinghouse installation?

Hearing Officer Altieri: Is that question clear to you, Mr. Smith?

The Witness: No.

Mr. Ryder: I will rephrase it.

Hearing Officer Altieri: You started one question, and you veered to another.

Mr. Ryder: Yes.

Q. (By Mr. Ryder): The Westinghouse officials at any time notified you of any claims by labor organization, other than the Machinists Union to the work the machinists were doing at Redondo Beach?

A. No. I am just trying to think, the first time that the company officials notified me of any claim being made by any other organization—

Q. Did Mr. Budge ever notify you of any such claim?

Respondents' Exhibit A—(Continued)
(Testimony of Floyd E. Smith.)

A. Yes, I am trying to think of approximately the date. It was the latter part, I believe, of January of '48.

Q. Are you certain about that date?

A. Yes—first part—no, it would have been the first—latter part of January of '49.

Q. Mr. Budge called you?

A. Called me by phone.

Q. What did he say?

A. He said to me that he had been informed, if I recall correctly, from someone from Stone-Webster that the Building Trades were making claims on the unit that was going to be installed. I believe that was the No. 2 house unit.

Q. At Redondo Beach?

A. Redondo Beach plant.

Q. What was the full substance of that conversation between you and [52] Mr. Budge?

A. Well, I don't recall just exactly. I believe I probably told him not to do too much worrying about it, that on various other jobs that probably the same claim had been made by Building Trades Council and the Carpenter-Millwrights.

Q. Did Mr. Budge during that conversation tell you what he intended to do about those claims?

A. I don't believe he did.

Q. Was there any other contact made by Mr.

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

Budge to yourself with respect to this same type of subject matter?

A. Yes. On the day of the stoppage of work by the Building Trades, or thereabouts. I won't say on that day, but right in that neighborhood.

Q. What was the substance of your conversation with Mr. Budge on that occasion?

A. Well, Mr. Budge notified me at that time that up until some other changes had been made by his firm that the Machinists would continue to do the work, as long as it was possible for them to work on the job.

Q. Did he state if any representative of any labor organization had contacted him with respect to that work?

Hearing Officer Altieri: There has been no objection to this line of testimony, Mr. Ryder. I see we are going into testimony that Mr. Budge has given. Do you want Mr. Smith to corroborate that?

Mr. Ryder: It is corroboration.

Hearing Officer Altieri: Let's all lend a hand in expediting the hearing.

Mr. Binkley: I will stipulate this witness will testify to the same facts Mr. Budge testified to in regard to this conversation.

Mr. Ryder: We will accept that stipulation.

Mr. Garrett: We won't.

Mr. Trautman: You understand that is not binding on any other [53] parties?

Respondents' Exhibit A—(Continued)
(Testimony of Floyd E. Smith.)

Mr. Ryder: All right.

Q. (By Mr. Ryder): The second contact Mr. Budge made to you, that was on the telephone, was it not?

A. It was over the phone.

Q. Did Mr. Budge tell you of a claim made by any representative of the Carpenters Union concerning the Machinists' work on the second house unit?

A. Yes. He notified me that a Mr. Barbaglia of the Carpenter-Millwrights had made a claim.

Q. Did he tell you what Mr. Barbaglia had told him?

A. If I recall correctly, he stated that Mr. Barbaglia had stated they would have to be—or that there would be a shutdown of the job.

Hearing Officer Altieri: I might add, Mr. Ryder, for its value, this corroborative testimony is rank hearsay, anyway. Go ahead, if you insist.

Q. (By Mr. Ryder): Did Mr. Budge contact you with respect to the assignment of men on the second house unit?

A. Would you repeat that, please?

Q. Did Mr. Budge contact you with respect to the assignment of installation mechanics on the second house unit?

A. I will answer that by stating to you it is Mr. Budge or Mr. Scanlan.

Q. On what date was that, if you remember?

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

A. The latter part of January of '49 they stated that it would be approximately the first of February that the second house unit would be started.

Q. Now, there was previous testimony, Mr. Smith, that the installation work on the second house unit was started on January 31st.

A. That is correct.

Q. Of 1949. In terms of that date, when did Mr. Budge contact you [54] with regard to that installation work?

A. Well, a few days prior, I would say approximately a week prior to that time. I would have to check records. I believe he notified me that—I am just trying to think whether both of the men were working on an installation job that was already going on or if they were laid off. I would have to check records on that.

I believe one was working and one was laid off for the layoff, was off the time.

Q. You are referring to Mr. Merrit and Mr. Herd? A. Yes.

Q. Referring to February 2nd, when the stoppage took place, did anybody notify you of this stoppage on that date?

A. I was notified on February 1st by one of my members working on the job that there was quite a bit of rumor that the job would be stopped the following morning——

Q. Who was that? A. Mr. Lou Merrit.

Q. Go ahead.

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

A. I asked him for what reason, and he said that the operating engineer operating the crane for them, or in the part they were working, notified him that—or that the operating engineer was informed that there was C.I.O. Machinists on the job, and that is why they were going to stop the job.

Q. The Machinists' Union is not in the C.I.O. Union, is it? A. Absolutely not.

Q. Well, when you got that information, what did you do?

A. I notified the boys that I would be there the following morning.

Q. Whom did you notify?

A. Mr. Merritt and Sinclair. I don't recall whether I had been in the office at the end of this shift or not; I probably did. I would have to get further information on so-called work stoppage that was supposed to have been the following morning. [55]

Q. Did you go to the plant site on the morning of the work stoppage? A. I was there.

Q. What did you see when you arrived?

A. A group of workers known to me as the—standing up in front of the gate—or I would say the employees' gate, where the time clocks are. I believe there are time clocks there. And a few at the gate that I call the truck gate, on down the main road or street that the plant is on.

Q. Was there any construction work going on

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

with respect to the plant, so far as you could see?

A. As far as I could see there wasn't. I walked back to this truck gate with the two members, Mr. Merritt and Sinclair, and asked a party there that I later found out was a representative of the Carpenter-Millwrights, by the name of Barton—and I asked him what was wrong, and he said that these—that they just decided to take a holiday.

Some workers standing there, construction workers—and I don't know their names—spoke up——

Mr. Trautman: This is going to be anonymous hearsay.

The Witness: This is what I overheard.

Q. (By Mr. Ryder): Do you know the names of the construction workers? A. I do not. [56]

Q. (By Mr. Ryder): Would you continue, please.

A. They stated that they were informed they were out because there was C.I.O. Machinists on the job.

Hearing Officer Altieri: Now, you have a compound anonymous hearsay.

Mr. Trautman: I didn't object.

Q. (By Mr. Ryder): Mr. Smith, did Mr. Sinclair and Mr. Merritt continue to work on the second house unit? A. They did.

Q. Until what date did they work, if you know?

A. I believe the end of their shift, work shift was the 10th of February. It was on a Thursday.

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

The following Friday morning, I believe it was February 11th, that they went in after their tools and left the job.

Q. Did any representative of the Westinghouse Corporation confer with you with respect to these men leaving the job finally? A. Yes.

Q. Who was that?

A. Mr. Budge called me, I believe, on the evening of the 10th—or in the afternoon of the 10th.

Q. What was the substance of that conversation?

A. He stated that no further parts or work for the machinists on the No. 2 House Unit were available and they would be off [57] the following—or as of the end of that shift, or the following morning.

Q. What did you say during that conversation?

A. Well, I believe that I probably said that I would so notify the men.

Q. Now, Mr. Smith, referring to the installation work of the General Electric Corporation at Redondo Beach, did any representative of the General Electric Company contact you with reference to obtaining help for the installation of the first General Electric Unit at Redondo Beach?

A. Yes. Mr. Wise of General Electric contacts me on all men that he wants for the mechanical end.

Q. When was that first contact made with respect to this Redondo installation?

A. If I remember correctly, on the setting of

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

the sole plates on the Redondo unit for General Electric. He notified me he had transferred some men from one of the repair jobs or installation jobs that was going on at the Long Beach Southern California Edison plant over to the Redondo plant.

Q. Did he request your supplying of any men by name?

A. Yes, there were several different ones that he requested to be supplied on the job.

Q. Could you name several of those men whom he requested at that time? Did he request Rufus Carter?

A. I believe at that time Rufus Carter was moved from a San Diego repair or installation job up to the Redondo Beach job. Jim Kay, a member, and Johnny Rose and his brother Herman Rose, Steve Gillette, Miles O'Hand and several others that are requested from time to time on various jobs, that I wouldn't know if they were on the Redondo job or just which job.

Q. When a transfer is made from one job to another, is that generally cleared by the employer through your office? [58]

A. As a rule, if the man is transferred from one job to another the steward, our union steward on the job notifies me of that transfer.

Q. At the time of Mr. Wise's first contact with respect to this first G. E. Unit, did you discuss terms and conditions of work?

Respondents' Exhibit A—(Continued)
(Testimony of Floyd E. Smith.)

A. Prior to that time at approximately the same time that we received an increase or an adjustment in wages from Westinghouse, we had talked over the wage rate for the—or the rate that would go into operation at the Redondo plant.

Q. Has that been a continuing affair, Mr. Wise clearing with respect to subsequent adjustments on rates and hours of work? A. That is right.

Q. Has that continued up to the present time?

A. It has.

Q. Covering other installations, other than Redondo? A. That is right.

Q. That is, the Terminal Island installation going on at the present time?

A. That is correct." [59]

FLOYD E. SMITH

Transcript, Vol. VII, pages 685-689

"Q. (By Mr. Garrett): On this Redondo Beach Edison job, have you ever had any of your members on there except as employees of the Westinghouse Company?

A. Not to my knowledge.

Q. So far as you know, you haven't had any of your members working for Stone & Webster or any of their subcontractors? A. No, sir.

Q. You knew at the time you put your men in there originally that was an A. F. of L. job, didn't you? A. Yes.

Respondents' Exhibit A—(Continued)
(Testimony of Floyd E. Smith.)

Q. Do you recall having a conversation with either Mr. Scanlon or Mr. D'Antoni—you know both of them, don't you? A. I do.

Q. —back in the middle of 1946, while they were working on the Harbor Steam plant job, concerning demands of the A. F. of L. Building Trades Council for the work on the Harbor Steam plant? You were supplying men on that work at that time, were you?

A. On the Harbor Steam plant, yes.

Q. By arrangement with Mr. Scanlon?

A. Correct.

Q. Of Westinghouse? A. Yes.

Q. They were working on their first unit there at that time, were they not?

A. The first unit went in the early part of 1946.

Q. I am referring to the time from July to September, 1946. That would be about the time Westinghouse was engaged in the installation of the first unit at the Harbor Steam plant?

A. That would be at that time they were in the first large unit.

Q. That is what I mean. A. Yes. [60]

Q. They had already installed a smaller unit?

A. Correct.

Q. At the time Mr. Scanlon was on that job at the Harbor Steam plant, was he not?

A. Mr. Scanlon was there.

Q. Was Mr. D'Antoni on that job also?

Respondents' Exhibit A—(Continued)
(Testimony of Floyd E. Smith.)

A. No, sir.

Q. Do you know who they had on that job as resident engineer? A. No, I don't.

Q. Do you recall anybody representing Westinghouse, besides Mr. Scanlon, who was on that job as engineer?

A. None of the work engineers that is there. I have met several of them, but I don't recall them by name. My dealings have never been with those men.

Q. I can't refer to them by name, but can you recall during the period from July to September, 1946, talking with either Mr. Scanlon or any other Westinghouse engineer on that Harbor Steam job about demands that were being made at that time by the A. F. of L. council that the A. F. of L. unions be permitted to do that work for Westinghouse.

A. No, I can't recall that I did.

Q. Can you recall talking to Gene Boyd of the A. F. of L. Building Trades Council about it along about the time I have mentioned?

Mr. Binkley: What was that name?

Mr. Garrett: Eugene Boyd.

Mr. Binkley: Can we have him identified?

Mr. Garrett: He is the former business agent for the Los Angeles Building and Construction Trades Council.

The Witness: No. I never talked to Mr. Boyd.

Q. (By Mr. Barrett): Do you recall talking to Mr. Merritt, in the period I have spoken of, on that

Respondents' Exhibit A—(Continued)

(Testimony of Floyd E. Smith.)

subject, that is, the period [61] from July to September, 1946, L. M. Merritt?

A. Yes, I believe I talked to Mr. Merritt once about it.

Mr. Garrett: To identify him for the record, he was at that time a business agent for Millwright Local 1607.

Q. (By Mr. Garrett): It is a fact, is it not, Mr. Smith, that in 1946 you made this connection with Westinghouse through Mr. Scanlon, and thereafter you furnished your men wherever you could to do the installation work on their turbo electric equipment?

A. Furnished all men for their erection work since the beginning of 1946.

Q. You think, as far as you are concerned, you have furnished all the men they have used on the work they have installed themselves?

A. That they have hired.

Q. Where they have done the hiring?

A. Yes, as far as I know.

Q. And, in general, you have gotten your men in on their work in all cases where they were able to hire your men, by reason of the fact that it was either a job that wasn't controlled by the A. F. of L., or was a repair job, or was a job like that, at the Harbor Steam plant, where they would be protected by an injunction?

Mr. White: We object to the question.

Respondents' Exhibit A—(Continued)
(Testimony of Floyd E. Smith.)

Hearing Officer Altieri: Sustained.

Q. (By Mr. Garrett): Now, it is a fact, is it not, that on other jobs where they have had to deal with A. F. of L. contractors, the Millwrights have been used to do the same work you have done on the jobs you have described?

Mr. Ryder: We object to that.

Hearing Officer Altieri: I will allow that, if he knows.

The Witness: To the best of my knowledge, every job that Westinghouse has erected in Southern California or the 12 Southern Counties, they have used my members of 1235, where they have hired.

Q. (By Mr. Garrett): Where they have hired?

A. Yes." [62]

HERMAN BARBAGLIA

Transcript, Volume VIII, page 980 to 986:

"Q. (By Mr. Garrett): After the conversation you had with Mr. Lyons in August, 1948, what is the next conversation you had with anyone about this matter, outside of conversations with persons connected with the labor movement?

A. I later, then as I said approximately two months later, somewhere in November or December, I am not quite sure, I contacted Mr. Budge on the telephone and talking to him about the—first on the

Respondents' Exhibit A—(Continued)

(Testimony of Herman Barbaglia.)

Stone and Webster job, and that it being the holidays that I would like to have an appointment with him after the holidays and between myself and one of our International representatives. After the holidays we tried to contact Mr. Budge and he either was not in or he was out on a ship making a trial run or something, and we could never get together, and to this date I have never met Mr. Budge and discussed this matter with him personally.

Q. You did talk to him over the 'phone though, did you? A. Just that one time.

Q. That was the first time you got him on the 'phone? A. That is right.

Q. Did you introduce yourself, tell him who you were? A. You mean lately?

Q. No, when——

A. Over the telephone, yes. Over the telephone I told him who I was.

Mr. Smith: Mr. Barbaglia, Mr. Budge.

The Witness: Over the telephone I told him who I was.

Q. (By Mr. Garrett): You already knew who he was?

A. That is right, and in our first conversation we discussed the job that was going on in El Centro, which was being done by Millwrights down there. [63]

Q. That is the Golden job, is it?

A. The general contractor was Golden. I un-

Respondents' Exhibit A—(Continued)
(Testimony of Herman Barbaglia.)

derstand Bryan Lane had the generator.

Q. Was that Westinghouse equipment down there?

A. That is right. I think it was a 15,000 kw generator.

Q. Is that a turbo-electric job down there?

A. That was. I never have been to the job. It was outside of El Centro. I believe it was for the Metropolitan Water District down there or some water outfit.

Q. Did he know Millwrights were working on that job? A. He did.

Q. Did you talk to him about Millwrights working on his next Redondo Beach unit?

A. I did not. I was trying to make that appointment for him and myself and the International to sit down with him and discuss it.

Q. Did he say you could have an appointment?

A. I don't remember if he told me—yes, he did. He says right after—I was the one that made the announcement that we would meet right after the holidays and then I would contact him then to make the appointment, and which as I tried to get him three or four times or whatever it may be, and we never got him, and of course the incident happened down at Redondo Beach.

Q. You never talked to Budge after that one telephone conversation? A. No.

Respondents' Exhibit A—(Continued)
(Testimony of Herman Barbaglia.)

Q. Did you go down there on the Redondo Beach job on the 31 of January, 1949?

A. No, I was down there I believe on a Monday before the stoppage of work and went in to see Mr. Sheets.

Q. Did you have a conversation with Sheets?

A. I did. I am trying to think what I said to him over there. This thing has been so long now.

Q. Wait a minute. Let's find out what date that Monday was.

A. That Monday was—I believe it was Monday, wasn't it?

Q. The 31st, January 31st?

A. I believe it was on a Monday or Monday or Tuesday. Wednesday I believe the job went down. I don't know what day the job went down, but anyway it was a couple of days before the job went down.

Q. January 31st was Monday. Did you talk to Mr. Budge on that date?

A. No, Mr. Sheets.

Q. Where was that, at the plant?

A. At his office, yes.

Q. Did he tell you whether or not he had already talked to Mr. Mashburn about the job?

A. He had.

Q. Did you have a conversation with Mr. Sheets, yourself? A. I did.

Respondents' Exhibit A—(Continued)
(Testimony of Herman Barbaglia.)

Q. Tell us about it. He is right here so he can let us know if it is wrong.

A. I am trying to remember what was said there. We discussed the work that Millwrights had done in different parts of the country on this type of work, and Mr. Sheets at that time agreed that Millwrights was doing so in other parts of the country, and I told him then that I didn't see why we can't use them here. I believe he told me the reason why we couldn't use them here, because Stone and Webster had no part of the installation of the generators. While we were in there talking to Mr. Sheets, there were two gentlemen came in, I do remember the name of one and I don't remember the name of the other one. The other was Mr. Scanlon of the [65] Westinghouse Electric.

Q. Did you see Scanlon?

A. That is right. My conversation with Mr. Scanlon was——

Mr. Binkley: Is this the same day?

The Witness: Yes. I asked Mr. Scanlon—I found out who Mr. Scanlon was, and I asked him at that time if he would not remove the two or three machinists that were on the job.

Q. (By Mr. Garrett): They were already there?

A. They were already on the job. They went to work on Monday morning.

Q. And they had gone on that same day?

Respondents' Exhibit A—(Continued)

(Testimony of Herman Barbaglia.)

A. Monday morning, yes.

Q. You are talking about Monday, aren't you?

A. That is right. I asked him then if he would remove those men off of the job until we could straighten this thing out within our organization.

Q. What organization? Did you tell him what organization you meant?

A. What I was referring to was the Building Trades Organization.

Q. I am not talking about what you were referring to. What did you tell Scanlon?

A. Well, that is what I told him.

Hearing Officer Altieri: I think that is what he was answering.

Mr. Garrett: I want to be sure about the conversation he is giving me now.

The Witness: If he would remove those men so that we could further work this thing out between our organization and Stone and Webster's organization and his organization. He told me he had no authority to move anybody off and that he would not move anybody off. [66]

Hearing Officer Altieri: During the conversation, was it clear to Mr. Scanlon you were talking about the Building Trades Council?

The Witness: That is right. I told him then that he was putting Stone and Webster in a peculiar position, I thought he was not cooperating with Stone and Webster by leaving these men on, for I

Respondents' Exhibit A—(Continued)
(Testimony of Herman Barbaglia.)

no doubt saw trouble in the wind, I was not sure but I had an idea, and with that he said he would not pull his men off and I bid him good day and I left." [67]

WILLIAM L. BUDGE

Evidence Relating To Demands By Respondents
Transcript, Volume III, page 278 to 282:

"Q. Mr. Budge, directing your attention to the dispute with respect to House Unit No. 2, when was it first brought to your attention that a labor organization other than the Machinists Union desired to do the installation work on that house unit?

A. Mr. Barbaglia called me sometime, as I recall, in late November or early December, stating that he would like to——

Mr. Binkley: What year was that? What year?

The Witness: It was in '48.—stating that he would like to discuss the erection or the labor for the erection of these units.

I told him I would be willing to see him in my office at any time, other than that particular day, as I was leaving to go out of town, and I have never heard from him since.

Q. (By Mr. Ryder): Mr. Barbaglia in that telephone—that is a telephone conversation?

A. Yes.

Q. In that telephone conversation did he state

Respondents' Exhibit A—(Continued)

(Testimony of William L. Budge.)

that he desired that you employ members of his union?

A. To my knowledge he didn't. He said he just wanted to discuss the situation.

Q. Did he elaborate on what he meant by "discussion"?

A. No, he didn't. As I recall, he had some of his—I think he called them International people or someone present that he wished to bring over, but he didn't elaborate on the situation.

Q. This call of Mr. Barbaglia, that you say was made in November or early December of 1948, was made after you had [68] employed Machinists on the installation of your No. 1 large unit and your No. 1 House Unit, is that right?

A. That is right.

Q. Did the Westinghouse Corporation employ any carpenters on the installation work of those two units?

A. Not to my knowledge.

Q. Would you know if the corporation had done such employing of carpenters?

A. Yes, I would.

Hearing Officer Altieri: Is your answer intended to convey the end result no carpenters were employed in the installation, Mr. Budge?

The Witness: That is right.

Hearing Officer Altieri: You say not to your knowledge. You leave an implication that possibly something occurred outside of your knowledge,

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

something may have happened. Is that what you intended to convey by that answer?

The Witness: I intended to convey that someone may have hired a carpenter to build a bench or something of that sort, and I may not have known about it; or a shack or something.

Q. (By Mr. Ryder): With respect to the actual installation work, however, Mr. Budge, so far as you know you did not hire any carpenters, is that a fact? A. That is right.

Q. Mr. Budge, is the Westinghouse Corporation the employer of all of the craft employees engaged on the installation work of a turbine-generator?

Mr. Garrett: That calls for a conclusion.

Hearing Officer Altieri: Overruled. You may answer.

The Witness: May I have the question?

(The question was read.)

Mr. Trautman: I suppose you mean at Redondo.

Mr. Ryder: At Redondo Beach plant.

The Witness: I assume you mean as far as our contract goes.

Q. (By Mr. Ryder): Yes. I mean the riggers that you mentioned previously, the electricians, the machinists, the pipefitters.

Mr. Garrett: There is no evidence they ever employed any of them. It is assuming facts not in evidence, and a leading question.

Hearing Officer Altieri: There was some testimony——

Respondents' Exhibit A—(Continued)

(Testimony of William L. Budge.)

Mr. Ryder: That he hired them.

Hearing Officer Altieri: The various crafts, they were hired, Mr. Garrett, if I recall correctly.

Mr. Garrett: That matter was interjected into a leading question, as to the answer, to which it was immaterial.

Hearing Officer Altieri: Is there an unanswered question?

Mr. Garrett: It is clearly not established by the testimony of this witness in this record that he or his company have ever hired any of the classifications.

Mr. Ryder: Mr. Examiner, I might mention here Mr. Budge has previously testified to the fact that he hired, Mr. Scanlon hired certain craft employees relating to this installation work.

Hearing Officer Altieri: I will allow him to answer the question, if he can.

The Witness: We pay a lot of people. We actually pay the employees that we have, such as riggers, pipefitters, machinists, electricians.

Q. (By Mr. Ryder): Have you paid all the employees that you have hired—

A. That is right.

Q. —on the installation work of these units?

A. That is right. [70]

Q. You consider them your employees, do you not? A. That is right.

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

Q. And you can fire them, if you don't like their work, can you not?

Mr. Binkley: Well, we think so. We are not sure.

The Witness: That depends on the union.

Q. (By Mr. Ryder): Outside of the union factor in here, you do have that right to discharge if their work is unsatisfactory?

Mr. Garrett: That calls for a conclusion.

Hearing Officer Altieri: I will sustain the objection. They are your employees to hire and fire as you will, presumably, is that correct?

The Witness: That is correct.

Q. (By Mr. Ryder): You have complete control of these employees during their working days, do you not?

Mr. Garrett: That calls for a conclusion; again leading.

The Witness: That is right.

Hearing Officer Altieri: Answer the question.

The Witness: We are controlling, we have control of their hours and of the time they work and control of the employees; we direct their operations."

WILLIAM L. BUDGE

Transcript, Volume III, page 283 to 285:

"Q. (By Mr. Ryder): Yes. Now, referring back to Mr. Barbaglia's call, when was the next time that any representative of a labor organization contacted you with respect to any job claims, on the

Respondents' Exhibit A—(Continued)

(Testimony of William L. Budge.)

installment work of the House Unit No. 2, if any?

A. As I recall, it was on February the 1st when Mr. Mashburn called me.

Q. What did he say?

A. As I recall the conversation was to the effect that, [71] 'When are you people going to take the Machinists off of this job?'

And my answer to that was that unless it was the customer's wishes that we do so, we were going to make no change at the present time, which Mr. Mashburn then told me he had no other recourse except to take action.

Q. To what job was he referring?

A. He was referring——

Mr. Garrett: That calls for a conclusion.

Hearing Officer Altieri: He may answer.

The Witness: He was referring to the work at the Redondo steam plant on the erection of the No. 2 House Unit.

Q. What action was he referring to?

Mr. Garrett: It calls for a conclusion.

Hearing Officer Altieri: Well, now, do you know what he was referring to?

The Witness: No, I don't.

Hearing Officer Altieri: The action, you do not know what it was that he was referring to?

The Witness: No.

Q. (By Mr. Ryder): You testified that you told Mr. Mashburn that you would take off the men

Respondents' Exhibit A—(Continued)
(Testimony of William L. Budge.)

only if the customer instructed you. What did you mean by that statement?

Mr. Garrett: Objected to as leading, calling for a conclusion; the conversation speaks for itself.

Q. (By Mr. Ryder): Did you explain that statement to Mr. Mashburn?

Hearing Officer Altieri: Did you offer an explanation of that statement to Mr. Mashburn?

The Witness: The only explanation I offered was that it would impair other jobs that I had working at the present time." [72]

SAUL M. SCANLON

Transcript, Volume VI, page 527:

"Q. You didn't talk to any other representatives of any other labor organizations?

A. Just at the time I met Mr. Barbaglia, I testified to before, at Mr. Sheets' office at one meeting. So far as I know that is the only one business representative, outside of Mr. Smith, I guess.

Q. Did you tell Mr. Barbaglia at that time this dispute was entirely new to you, that you hadn't known anything about it before?

A. I don't recall telling him anything like that, it being new. I told him I just didn't have any authority to stop and take the men off, as he directed me to do."

LEM MATTHIAS MERRITT

Transcript, Volume VIII, page 860 to 867:

“Q. (By Mr. Garrett): Mr. Merritt, in July of 1946 were you connected with the Millwrights Local 1607? A. Yes, I was.

Q. What position did you hold with them at that time?

A. I was the business representative for the Millwrights.

Q. And sometime in that period between July and September 1946, do you recall going to the harbor steam plant?”

LEM MATTHIAS MERRITT

Transcript, Volume VIII, page 867 to 869:

“A. No, Building Trades in Los Angeles, so shortly after that, I don't remember how long, it might have been a month or so, the second unit in that thing was pretty well along and begun to get ready for installation, and I think it was on the floor, and Gene Boyd and myself went down to see the turbine [73] as it was being got ready to set up, and we met the man in charge.

Q. The man in charge for whom?

A. Of setting of the turbine, as I recall they were the Westinghouse people, and I think the man—I am not really sure about the fellow's name, but I think it was Scanlon, I am not sure whether it was or not. I think I would know the man if I saw him, and I have not seen him in this hearing,

Respondents' Exhibit A—(Continued)

(Testimony of Lem Matthias Merritt.)

and I looked around there and I have not seen him.

Mr. Binkley: I don't think Scanlon is here right now.

The Witness: I never met him but one time, and Boyd introduced me and he told me who he was, and then in this meeting we had quite a conversation about work, and Mr. Boyd told him that in the opinion of the Building Trades that work belonged to the Millwrights.

Mr. Binkley: Just a minute. Could we have the persons present at this conversation? Boyd and Scanlon and who else were present?

Q. (By Mr. Garrett): Were there any other people present at that conversation?

A. Those were the only people I talked to. There were a lot of people around there, but the three of us were doing the talking.

Q. Has Mr. Boyd subsequently died?

A. That is right. He died shortly after that, I would say a month or two after this, and Mr. Boyd felt that so far as that work was concerned it belonged in the opinion of the Building Trades, to the Millwrights, and he said, Mr. Scanlon if it was Scanlon, I am not sure about that, he said that he didn't care what the Building Trades thought, that the work belonged to the Machinists and he had been doing it with [74] Machinists and he expected to continue to do it with Machinists, Westinghouse always employed Machinists, and as I

Respondents' Exhibit A—(Continued)

(Testimony of Lem Matthias Merritt.)

recall Mr. Boyd told him that he didn't think Westinghouse had always employed Machinists, and this was one particular job that he was going to find out whether or not they could employ them on the work on that job, and they had quite a little argument over it. Of course I was more or less as a standby, I just stood there and listened, but I didn't have very much to say in the conversation, because after all I was down there with the Building Trades.

Hearing Officer Altieri: You have answered the question.

The Witness: That is about all I have to say about it.

Q. (By Mr. Garrett): How long after that did you remain business agent for the Millwright Local 1607?

A. Well, I was the business agent up until June of 1947, I guess, and then I think three months after that I was assistant business agent. That is as I recall it. I could go back and look it up, and I don't remember for sure."

LEM MATTHIAS MERRITT

Transcript VIII, page 873 to 874:

Q. And what methods did you go about protesting the work?

A. Well, I usually left that up to the Building Trades.

Q. How does the Building Trades go about protesting the work, sir?

Respondents' Exhibit A—(Continued)
(Testimony of Lem Matthias Merritt.)

A. I suggest that you ask them. They can probably tell you better than I can.

Q. Don't you know?

A. Well, I know some of the things they do, yes.

Q. 1607 at the time of your representation of that local was an affiliate with the Building Trades Council?

A. That is right. [75]

Q. And therefore wouldn't you know how the Building Trades Council would help Local 1607 in protesting the work that Local 1607 thinks belongs to it?

A. Yes, I think I would know the procedure.

Q. What would the procedure be, sir?

A. Well, might take different courses, but as a general rule if there is a dispute arising before the—any affiliate of the Building Trades, the Building Trades would probably call a meeting of the people in some respects to get down to the bottom of the thing, possibly representatives for the Machinists, representatives of the Millwrights, maybe the employers, and so forth."

HERMAN BARBAGLIA

Transcript, Volume VIII, pages 969 to 970:

"Q. (By Mr. Garrett): What position do you hold?

A. I am now representative of Millwrights Local 1607.

Q. Since when?

A. Since July 8th, 1949."

Respondents' Exhibit A—(Continued)

HERMAN BARBAGLIA

Transcript, Volume VIII, pages 974 to 977:

“Q. At the time you talked to Mr. Lyons, did you know who was going to install the next Westinghouse unit?

A. I didn't know who was going to install it. I was told that there was a——

Mr. Ryder: Just a minute. I think we ought to establish a foundation for this conversation.

Q. (By Mr. Garrett): Who told you?

A. Mr. Lyons.

Q. Did you have at that time, aside from this conversation with Mr. Lyons that you were going to tell me about, did you [76] make inquiries about who was going to install the next house unit?

A. That is right. I went to see Mr. Lyons about the installation of the next house unit.

Q. Because you wanted to go out and see whoever had control to find out who was going to install it, is that right? A. That is right.

Q. All right. What did Mr. Lyons tell you about it?

A. I believe that Mr. Lyons told me that the situation was going to be the same as on the previous unit, that——

Q. That is the previous house unit or the previous line unit?

A. All three units there, the house unit and two 60,000 units, one would be set by G.E. and the other two would be set by Westinghouse.

Respondents' Exhibit A—(Continued)
(Testimony of Herman Barbaglia.)

Q. Did you make any representations to Mr. Lyons as to who that work belonged to?

A. I did.

Q. Tell us the conversation in substance.

A. I told Mr. Lyons at that time that that work came under our jurisdiction and that I was going to contend for it, and Mr. Lyons then informed me that he had no power or authority to give me an answer as to—about my people doing it, other than I had the privilege to contend for it. With that I did state I would contend for it, and I told him that.

Q. Did you use that word contend?

A. That is right. I told him that and with that we stopped our conversation and then from there I went on and went through the job and went on back and went in to see Mr. Mashburn as to what position the Building Trades was going to take in contending that work belonged to the Millwrights. At the time I don't remember what——

Q. I take it there were no Machinists on the job at that time? [77]

A. No, this was in September, and there was no, no. In fact I was informed by Mr.—I believe by Mr. Lyons that there would not be any units installed there until somewhere in June of this year.

Q. No units installed until June of this year?

A. Yes, those three units that were in here now, the G.E. and Westinghouse unit, that they were

Respondents' Exhibit A—(Continued)

(Testimony of Herman Barbaglia.)

not scheduled to be installed until June of this year.

Q. 1949? A. That is right.

Q. When did you find out they were going to install a house until prior to June 1949?

A. I finally found out, I think the record shows the second. I found out about two weeks before that and that the schedule was being advanced, and that the new equipment—it was before that, that the house unit would be set, I believe, the 31 of January.

Q. Now, before we go on to that, have you told us all that took place in the conversation that you had with Mr. Lyons during the holiday season?

A. That was the only time I talked to Lyons about that.

Q. Have you given us the whole conversation or was there something more said by either one of you?

A. Well, I don't remember now what—how many words was said. I am only giving you the point that I had made my contention that I had notified Stone and Webster on this or Mr. Lyons.

Q. Have you given us the substance of the entire conversation already, or is there something more remaining for you to tell us about?

A. No, that is all, I guess, as far as Mr. Lyons is concerned." [78]

Respondents' Exhibit A—(Continued)

De Minimis

FLOYD E. SMITH

Transcript, Volume VI, page 634:

“Q. What were the names of the men you referred to on the second house unit?

A. Lour Merritt and Ralph Sinclair.”

Further affiant saith not.

/s/ ARTHUR GARRETT.

Subscribed and sworn to before me this 16th day of May, 1949.

[Seal] /s/ ELIZABETH B. DODGE,

Notary Public in and for the County of Los Angeles, State of California. [79]

Exhibit 1

December 29, 1947.

Mr. S. M. Scanlon,
Field Supervisor.
Westinghouse Electric Co.,
153 Corona Ave.,
Long Beach, 3, California.

Dear Sir:

This letter is to confirm our verbal conversation of last week concerning hourly rates, shift work on construction jobs.

Regular Daylight Shift: An eight and one-half hour period less thirty minutes for meals on the employees time. Pay for a full shift period shall be a sum equivalent to eight times the regular hourly rate with no premium.

Respondents' Exhibit A—(Continued)

Second Shift: An eight hour period less thirty minutes for meals on employers time. Pay for a full second shift period shall be a sum equivalent to eight times the regular hourly rate.

Where there are three shifts working each shift shall work an eight hour period less thirty minutes for meals on employees time. Pay for a full shift period on any shift shall be a sum equivalent to eight times the hourly rate.

Hoping this information answers your questions and if you need more information please notify me.

Yours truly,

FLOYD E. SMITH,

Business Representative.

Copy to:

W. L. BUDGE

Exhibit 2

Mr. S. M. Scanlon,
Field Supervisor,
Westinghouse Electric Co.,
153 Corona Ave.,
Long Beach, 3, California.

Dear Sir:

This letter is to confirm our conversation of the other day concerning the hourly increase of Twenty-five (25) cents per hour for Journeymen, Ten (10) cents per hour for Helpers and Thirty-five (35) cents per hour for Foremen.

As I stated to you the increase would go into effect January 15, 1948. As the 15th of January

Respondents' Exhibit A—(Continued)
comes on Thursday, we will extend the date to
January 19, 1948.

Day Shift	\$2.25
Journeyman Machinists	1.60
Machinists Helpers	1.60
Machinists Foremen	2.50

Swing Shift: Same hourly rate as day shift
with men working 7½ hours per shift and being
paid for 8 hours.

Graveyard Shift: Same hourly rate as day shift
with men working 7 hours per shift and being paid
for 8 hours.

Overtime rate is double the hourly rate for all
shifts working in excess of 8 hours in any one day,
or more than 40 hours in any one week. All Satur-
days, Sundays and Holidays are paid for at the
overtime rate.

The following companies have agreed to pay the
new rate:

General Electric Co.

Gross Press Co.—(On Press Telegram)

J. B. Gill Construction Co.

Yours truly,

FLOYD E. SMITH,

Business Representative.

Copy to:

W. L. BUDGE

Respondents' Exhibit A—(Continued)

Exhibit 3

October 21, 1947.

Mr. William Long,
Accounting Department,
Westinghouse Electric Company,
420 South San Pedro Street,
Los Angeles, California.

Dear Sir:

The following established hourly wage scale applies to members of the International Association of Machinists employed on construction project:

Day Shift

Journeymen Machinists	\$2.00
Machinist Helpers	1.50
Machinist Foremen	2.15

Swing Shift, same hourly rate with men working 7½ hours per shift and being paid for 8 hours.

Graveyard Shift, same hourly rate with men working 7 hours per shift and being paid for 8 hours.

Overtime rate is double the hourly rate for all shifts working in excess of 8 hours in any one day, or more than 40 hours in any one week. All Saturdays, Sundays and Holidays are paid for at the overtime rate.

Yours truly,

FLOYD E. SMITH,

Business Agent,

I.A. of M. No. 1235.

FES:hl

Respondents' Exhibit A—(Continued)

Exhibit 4

July 27, 1947

I. A. M. Lodge 1235,
Mr. Floyd E. Smith,
Business Agent.

This letter is to confirm our verbal conversation concerning the rates now being paid the Machinists and Machinist Helpers. At the present time the rates are: Machinist \$2.00 per hour and Machinist Helper \$1.50 per hour.

W. L. BUDGE,
/s/ WILLIAM L. BUDGE,
Steam Service Supervisor,
Westinghouse Electric Corp.

Respondents' Exhibit A—(Continued)
Exhibit 5

Westinghouse Electric Corporation

Tel. Trinity 8331,
420 So. San Pedro Street,
Los Angeles Calif.,
January 22, 1948.

Mr. Floyd E. Smith,
Business Representative,
International Association of Machinists,
Long Beach Lodge No. 1235,
726 Elm Avenue,
Long Beach, California.

Dear Sir:

In line with your letter of January 14, we wish to confirm the fact that we are now paying men of the Machinist Union \$2.25 an hour for Journeymen, and \$1.60 an hour for Helpers.

Very truly yours,

W. L. BUDGE

Steam Service Supervisor,
Engineering & Service Division.

Admitted May 16, 1949.

PLAINTIFF'S EXHIBIT NO. 1

United States of America
National Labor Relations Board

Case No. 21-CD-19

I, Frank M. Kleiler, Executive Secretary of the National Labor Relations Board, being duly authorized by the Rules and Regulations of said Board, do hereby certify that annexed hereto is a full, true, and complete copy of the Decision and Determination of Dispute

In the Matter of

LOS ANGELES BUILDING and CONSTRUCTION TRADES COUNCIL, A.F.L., and LLOYD A. MASHBURN, ITS AGENT; MILLWRIGHT and MACHINERY ERECTORS LOCAL 1607, of the UNITED BROTHERHOOD OF CARPENTERS and JOINERS of AMERICA, A.F.L., and HERMAN F. BARBAGLIA, ITS AGENT

and

INTERNATIONAL ASSOCIATION OF MACHINISTS, for its LOCAL LODGE 1235

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the National Labor Relations Board this 12th day of May, A.D. 1949, at Washington, D. C.

[Seal]

/s/ FRANK M. KLEILER,
Executive Secretary.

Plaintiff's Exhibit No. 1—(Continued)

United States of America
Before the National Labor Relations Board

Case No. 21-CD-19

In the Matter of

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, A.F.L., AND LLOYD A. MASHBURN, ITS AGENT; MILLWRIGHT AND MACHINERY ERECTORS LOCAL 1607, of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L., AND HERMAN F. BARBAGLIA, ITS AGENT

and

INTERNATIONAL ASSOCIATION OF MACHINISTS, for its LOCAL LODGE 1235

DECISION AND
DETERMINATION OF DISPUTE

Statement of the Case

This proceeding arises under Section 10(k) of the Act, as amended by Labor Management Relations Act, 1947, which provides that "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of Section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen. . . ."

Plaintiff's Exhibit No. 1—(Continued)

On February 2, 1949, International Association of Machinists, on behalf of its Local Lodge 1235, herein called the Machinists, filed with the Regional Director for the Twenty-first Region a charge alleging that Los Angeles Building and Construction Trades Council, A.F.L., herein called the Trades Council, and Lloyd A. Mashburn, its agent, had engaged in and were engaging in certain activities proscribed by Section 8(b)(4)(D) of the amended Act. It was alleged, in substance, that they engaged in a strike, with an object of forcing and requiring Westinghouse Electric Corporation, herein called Westinghouse, and/or Stone and Webster Engineering Corporation, herein called Stone, to assign particular work to members of "affiliates" of United Brotherhood of Carpenters and Joiners of America, A.F.L.¹

¹The relevant portions of Section 8 of the Act are as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents——

* * *

(4) to engage in, or to induce or encourage the employees of any employed to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: . . .

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular

Plaintiff's Exhibit No. 1—(Continued)

Pursuant to Sections 203.74 and 203.75 of the Board's Rules and Regulations, Series 5, as amended, the Regional Director investigated the charges and provided for an appropriate hearing upon due notice to all the parties.² Thereafter, a

trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to any order or certification of the Board determining the bargaining representative for employees performing such work: . . .

²Millwright and Machinery Erectors Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A.F.L., herein called the Millwrights, and Herman F. Barbaglia, its agent, appeared at the opening of the hearing on March 10, 1949, and moved for a 10-day continuance, on the ground that they had not been made parties respondent until the service of an amended charge a day earlier. The hearing officer denied this motion, without prejudice to its renewal at any time the Millwrights "claimed surprise." Counsel for the Millwrights thereupon withdrew from the hearing, and now alleges a denial of due process. We find that the Millwrights, which the records shows was the only "affiliate" of the Carpenters involved herein, was duly apprised of this proceeding by service of the original notice of hearing. Moreover, the Millwrights refused the hearing officer's express reservation to it of the right to renew the motion if "surprise" were claimed.

The Trades Council and the Millwrights also moved the Board to strike the "Second Amended Charge" or, alternatively, to remand the proceeding for further hearing on new matter raised by the

Plaintiff's Exhibit No. 1—(Continued)

hearing was held before James V. Altieri, hearing officer, on March 10, 11, 14, 15, 17, 18, 21, 22, 23, and 24, 1949. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. The rulings of the hearing officer made at the hearing are free from prejudicial error and are hereby affirmed. All parties were afforded an opportunity to file briefs with the Board; the Machinists, the Millwrights, and the Trades Council did so. The requests for oral argument of the Trades Council and the Millwrights are denied because the record and briefs, in our opinion, adequately present the issues and positions of the parties.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The business of the companies

Westinghouse Electric Corporation maintains, inter alia, two plants in the Commonwealth of Pennsylvania, where it is engaged in the manufacture of turbines and generators. The record reveals that a substantial amount of the raw material used

Second Amended Charge. We do not consider the second Amended Charge, which was not filed until after the close of the hearing, as part of the record before us, and we do not, therefore, find it necessary to pass upon the motion at this time.

Plaintiff's Exhibit No. 1—(Continued)

in the production of these turbines and generators comes from outside the Commonwealth of Pennsylvania. The turbine generator with which the instant dispute is concerned was shipped to California by Westinghouse from its Pennsylvania plants, and is being installed by Westinghouse in California. We have heretofore found that Westinghouse is engaged in commerce.³

Southern California Edison Company, herein called Edison, is a utility company, and delivers electric power to consumers in southern California. During 1948, approximately 39 per cent of its total sales was to industrial consumers, a substantial number of which are engaged in commerce. It purchases much of its equipment, including the turbine generator here involved, from outside the State of California. We have heretofore found that Edison is engaged in commerce.⁴

We find, contrary to the contention of the Trades Council, that the companies are engaged in commerce within the meaning of the Act.

2. The dispute

a. The facts

Early in 1946, Edison entered into contracts with various contractors for the construction of a new

³Matter of Westinghouse Electric Corporation, 72 N.L.R.B. 60.

⁴Matter of Southern California Edison Company, 70 N.L.R.B. 81.

Plaintiff's Exhibit No. 1—(Continued)

power plant at Redondo Beach, California. Chief among these contractors was Stone, which also acts in an advisory capacity to Edison for the entire project. Before construction of the power plant began, Edison had made arrangements for the purchase and installation of five steam turbine generator units. Two of these generators have already been installed, one each by Westinghouse and General Electric Company; the third was being installed by Westinghouse when the dispute with which we are now concerned began; the fourth is to be supplied and installed by General Electric, and operations on it are scheduled to begin about June 1, 1949; and the fifth is to be supplied and installed at some future date by Westinghouse.

Stone and the other contractors working on the Redondo Beach project, with the exception of Westinghouse and General Electric, have employed only Trades Council members since the construction began. Westinghouse and General Electric had installed the first two generators using two Machinists' members, as well as some Trades Council members. A short time before the installation of the third generator was scheduled to begin, representatives of the Trades Council and the Millwrights approached Stone and attempted to persuade Stone to have Westinghouse replace the Machinists with Millwrights. Stone disclaimed responsibility for the employment of these Machinists, saying that they were Westinghouse employees. On January 31,

Plaintiff's Exhibit No. 1—(Continued)

1949, installation work on this third generator started. Shortly thereafter, a Trades Council representative, Mashburn, asked William Budge, supervisor of the installation for Westinghouse, to replace the Machinists with Millwrights. Budge refused, whereupon Mashburn said that he had no other recourse "except to take action."

On February 2, 1949, the Trades Council called a general strike of all the building trades employees on the project to enforce its demand on Westinghouse. All of the approximately 650 employees walked out, except the 2 Machinists employed by Westinghouse. The latter worked until February 11, 1949, when Edison requested Westinghouse to cease its installation work until the dispute was resolved. At the time of the hearing, no further installation work had been done on the generator, although work on the rest of the project had been resumed.

b. Contentions of the parties

Neither Edison nor Stone has advanced any contentions respecting the merits of the dispute, nor has the Millwrights. Westinghouse, although it likewise advanced no contentions, is clearly not a disinterested party; its refusal to accede to the Trades Council's request precipitated the dispute.

The Machinists contends that the work tasks involved in the installation of generators is properly the craft and trade work of its members, and that

Plaintiff's Exhibit No. 1—(Continued)

it has satisfactorily supplied employees for all the generator installation work on the project, including the two completed installations.

The Trades Council contends that the Board is without jurisdiction to determine the dispute for three reasons: (1) this case does not involve a "jurisdictional dispute," but presents a question of representation; (2) the dispute is not one "affecting commerce;" and (3) Section 8(b)(4)(D) is unconstitutional. The Trades Council also asserts that, in any event, the Millwrights is entitled to the work in question for various reasons: (1) the work falls within the jurisdiction and the trade and craft skills of its members; (2) the Trades Council has a right, under the provisions of its contract with Stone, to demand conformance from Westinghouse with the terms of that contract; (3) A. F. of L. decisions, made while the Machinists was affiliated with the A. F. of L., awarded work of the type in question to the Millwrights; (4) as the Building Trades Department of the A. F. of L. (with which the Machinists was never affiliated) is the only body that can effectively determine a "jurisdictional dispute" between subordinate locals in the construction field, no non-affiliated union should be permitted to supply workers in this field; (5) the existing assignment of work by Westinghouse to the Machinists is immaterial; otherwise the employer could "oust the Board itself of jurisdiction;" (6) as there are approximately 650 Trades Council members on

Plaintiff's Exhibit No. 1—(Continued)

the project, and the dispute involves only 2 employees not members of the Trades Council, the purposes of the Act will "be better effectuated" by a determination by the Board that will compel Westinghouse to conform its employment practices to those of the other contractors on the job; and (7) this Section 10(k) proceeding should be dismissed as "de minimis" because the dispute involves only 2 out of 650 employees.

c. Applicability of the statute

The Board has held in several cases⁵ that where a labor organization is charged with forcing or requiring an employer to assign particular work to members of a particular labor organization rather than to employees of his own who are members of another labor organization, such conduct comes

⁵Matter of Moore Drydock Company, 81 N.L.R.B., No. 169; Matter of Juneau Spruce Corporation, 82 N.L.R.B., No. 71; Matter of Irwin-Lyons Lumber Company, 82 N.L.R.B., No. 107.

Members Houston and Murdock, who dissented in each of these cases, deem themselves bound to concur in the present decision. Moreover, they agree entirely with the observation, *infra*, that "the employer in most cases will have resolved by his own employment policy, the question as to which organization shall be awarded the work." It is for this reason, as these dissenting Members have consistently pointed out, that they believe the Board should eschew the pretense of deciding such matters under Section 10(k) of the Act, in cases like this when the issue is predetermined by the employer.

Plaintiff's Exhibit No. 1—(Continued)
within the purview of Section 8(b)(4)(D) and the Board is "empowered and directed to hear and determine the dispute."

On the record before us, it is clear that the "dispute" in this proceeding involves efforts by the Respondents to compel Westinghouse to assign certain installation work to members of the Millwrights, although the work was being performed by Westinghouse employees who were members of the Machinists. We find, therefore, that under the language of the Act as presently written, the dispute in question is properly before us for determination.⁶

d. The merits of the dispute

At the time the dispute began, Westinghouse was employing two machinists and two riggers on the project; the former were members of the Machinists, and the latter were members of an affiliate of the Trades Council other than the Millwrights. Westinghouse had assigned the work in dispute to the Machinists. The Respondents insisted that Westinghouse assign the work to the Millwrights. The Board said in *Matter of Juneau Spruce Corporation*, *supra*:

As we read Sections 8 (b) (4) (D) and 10 (k), these Sections do not deprive an employer of the right to assign work to his own employees; nor

⁶The Trades Council's contention that Section 8(b)(4)(D) is unconstitutional is also rejected. *Matter of Rite-Form Corset Company, Inc.*, 75 N.L.R.B. 174.

Plaintiff's Exhibit No. 1—(Continued)

were they intended to interfere with an employer's freedom to hire, subject only to the requirement against discrimination as contained in Section 8 (a) (3).

And in the Irwin-Lyons case, *supra*, we held that the questions of tradition or custom in the industry is not a governing factor “. . . where a union with no bargaining or representative status makes demands on an employer for the assignment of work to the exclusion of the employer's own employees who are performing the work . . .” None of the contentions here advanced impels us to reach a different conclusion in this case. Westinghouse had no collective bargaining agreement with any labor organization concerning the employees involved. The fact that Stone, another contractor on the project, was operating under an agreement with the Trades Council, does not subject Westinghouse to any of the obligations of that agreement. It is clear that Westinghouse was not under contract with Stone, and was free to make use of its own employees for the installation, despite the fact that the other employers on the project used Trades Council employees.⁷

We find, accordingly, that neither the Trades Council nor the Millwrights is lawfully entitled

⁷As Westinghouse was not a party to any A. F. of L. awards of jurisdiction, we find no merit to the Trades Council's contention that such awards in its favor are determinative in this case.

Plaintiff's Exhibit No. 1—(Continued)

to require Westinghouse to assign the work in dispute to members of the Millwrights rather than to employees of Westinghouse who are members of the Machinists.

We are not by this action to be regarded as “assigning” the work in question to the Machinists. Because an affirmative award to either labor organization would be tantamount to allowing that organization to require Westinghouse to employ only its members and therefore to violate Section 8 (a) (3) of the Act, we believe we can make no such award. In reaching this conclusion we are aware that the employer in most cases will have resolved, by his own employment policy, the question as to which organization shall be awarded the work. Under the statute as now drawn, however, we see no way in which we can, by Board reliance upon such factors as tradition or custom in the industry, overrule his determination in a situation of this particular character.

Determination of Dispute

On the basis of the foregoing findings of fact and the entire record in this case, the Board makes the following determination of the dispute, pursuant to Section 10 (k) of the amended Act:⁸

⁸The Machinists contend that any determination by the Board should also include future installation work at the Redondo Beach project of Edison. We find no merit to that contention, and shall restrict our determination here to the dispute before us.

Plaintiff's Exhibit No. 1—(Continued)

1. Los Angeles Building and Construction Trades Council, A.F.L., and Lloyd A. Mashburn, its agent, and Millwright and Machinery Erectors Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A.F.L., and Herman F. Barbaglia, its agent, are not, and have not been, lawfully entitled to force or require Westinghouse Electric Corporation to assign work on the installation of steam turbine generators at Southern California Edison Company's plant at Redondo Beach, California, to members of Millwright and Machinery Erectors Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A.F.L., rather than to employees of Westinghouse Electric Corporation who are members of International Association of Machinists, Local Lodge 1235.

2. Within ten (10) days from the date of this Decision and Determination of Dispute, each of the Respondents may notify the Regional Director for the Twenty-first Region, in writing, what steps the Respondents have taken to comply with the terms of this Decision and Determination of Dispute.

Signed at Washington, D.C., this 11th day of May, 1949.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

Plaintiff's Exhibit No. 1—(Continued)

JAMES J. REYNOLDS, JR.,

Member.

ABE MURDOCK,

Member.

J. COPELAND GRAY,

Member.

[Seal]

NATIONAL LABOR

RELATIONS BOARD

Admitted May 16, 1949.

PLAINTIFF'S EXHIBIT No. 2

In the United States District Court for the
Southern District of California, Central Division

No. 9629-Y

HOWARD F. LEBARON, Regional Director of
the Twenty-First Region of the National Labor
Relations Board, for and on Behalf of the
National Labor Relations Board,

Petitioner,

vs.

LOS ANGELES BUILDING AND CONSTRUCTION
TRADES COUNCIL; and Its Agent
LLOYD A. MASHBURN; MILLWRIGHT
AND MACHINERY ERECTORS, LOCAL
1607, OF UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA,
A.F.L.; and Its Agent HERMAN BAR-
BAGLIA,

Respondents.

Plaintiff's Exhibit No. 2—(Continued)

AFFIDAVIT OF JEROME SMITH

State of California,

County of Los Angeles—ss.

Jerome Smith, being first duly sworn, deposes and says:

That he is an attorney, duly licensed in the Courts of States of Colorado, Iowa, Missouri and the Eighth Circuit Court of Appeals, and is attorney for petitioner herein.

That pursuant to the provisions of Section 10-k of the National Labor Relations Act, as amended June 23, 1947, (61 Stat. 136 et seq; 29 U.S.C.A. Sup. I Sec. 141 et seq) hereinafter called the Act, the National Labor Relations Board, hereinafter called the Board, conducted a hearing in Los Angeles, California, on March 10, 11, 14, 15, 17, 18, 21, 22, 23 and 24, 1949, before James V. Altieri, hearing officer designated to conduct said hearing by said Board, upon the charge and first amended charge attached to the petition herein, pursuant to a notice of hearing issued by said Board. That in said hearing evidence under oath, both oral and documentary, was adduced, and an official transcript made and returned to and filed with said Board, a copy of which is in affiant's possession. That in said hearing affiant represented Robert N. Denham, General Counsel, National Labor Relations Board. That the statements of witnesses set forth below were made at said hearing under oath, and reported in said transcript; transcript references

Plaintiff's Exhibit No. 2—(Continued)

are to that transcript. The attorneys whose names appear in the excerpts are Garrett, representing Los Angeles Building and Construction Trades Council and Lloyd A. Mashburn, respondents here; Smith, Jerome, representing the Board; Binkley, representing Westinghouse; Trautman, representing Stone and Webster; Smith, William French, representing Edison; and Ryder, and White, representing the International Association of Machinists, also known as I.A.M.

TESTIMONY OF LLOYD A. MASHBURN

Direct Examination

Transcript, Volume VIII, page 1211:

By Mr. Garrett:

“Q. State your name, please.

A. Lloyd Mashburn.

Q. And are you connected with any labor organization?

A. I am secretary of the Los Angeles Building and Construction Trades Council, among other connections.

Transcript, Volume VIII, page 1240:

Q. (By Mr. Garrett): Now, at that discussion you had in August of 1947, at the plant, with Mr. Cleary and Mr. Sheets, did they tell you anything about the nature of the contract for the installation of the turboelectric units?

A. Yes, they told me they had no control over

Plaintiff's Exhibit No. 2—(Continued)

(Testimony of Lloyd A. Mashburn.)

the contract; that it was directly General Electric, Westinghouse and Edison Companies.

Transcript, Volume VIII, page 1242:

Q. Now, in this August, 1947, interview, did either Mr. Sheets or Mr. Cleary tell you what they were going to do about the employment of machinists by Westinghouse, if anything?

A. No, I don't believe they did. I made the request for them to intercede with the Edison Company, to have the work done by A.F.L. men, but I don't believe there were any promises made as to what they could or couldn't do.

Q. Was there any discussion at that time about what your attitude would be?

A. Yes; I told them we would have to insist that Millwrights do the work.

Q. Did you have any personal interviews with either Mr. Cleary or Mr. Sheets on the subject again prior to the time you wrote them the letter which is Building Trades' Exhibit No. 6? [Building Trades Exhibit No. 6 is attached hereto and by this reference made part of this affidavit.]

A. I discussed it several times with Mr. Sheets or Mr. Lyon over the phone, but no personal meetings, except the two that have been mentioned, that I can remember.

Transcript, Volume VIII, page 1245 and 1246:

Q. Did anything else occur at the Associated

Plaintiff's Exhibit No. 2—(Continued)

(Testimony of Lloyd A. Mashburn.)

General Contractors' meeting with Mr. Sheets, Mr. Boyce in December of 1948—was anything else said by any of the parties that you haven't told us about?

A. I would say we had a two-hour discussion there about the terms of the contract, the settlement of jurisdictional disputes, and a general discussion of the whole picture, and how it was going to affect the progress of the job. We spent two hours discussing it. It was all concentrated upon this dispute between the Millwrights and the Machinists.

Transcript, Volume VIII, page 1248:

Q. Were you here when Mr. Budge testified as to the substance of that telephone conversation he had with you on February 1st?

A. Yes, I was here.

Q. What was the substance of that conversation you had with Mr. Budge?

A. About as he related it, with the exception we did discuss the mechanical end of it. He felt we didn't have qualified mechanics. We did have some discussion about that.

Q. What was that discussion?

A. He told me that the Westinghouse people had employed Millwrights in Imperial Valley, or, at least, they were caused to be employed upon some installation of their work, and they were not satisfied with their work. We had some discussion about that; not too long.

Plaintiff's Exhibit No. 2—(Continued)
(Testimony of Lloyd A. Mashburn.)

Transcript, Volume VIII, page 1249:

Q. So at the termination of this conversation on February 1st with Mr. Budge on the telephone, what position was he taking with respect to you where the Millwrights were to be used?

A. He said Edison Company had not requested him to employ any certain type of people and he was going to, insofar as he knew, employ machinists on the type of work we were discussing.

Q. Did he give any reasons for making that decision?

A. The only illustration he gave me was his experience at Imperial, being dissatisfied with the Millwrights, I think."

TESTIMONY OF HERMAN BARBAGLIA Cross-Examination .

Transcript, Volume VII, page 1005 and 1006:

"Q. Now, Mr. Barbaglia, you have testified on direct examination that in December, 1948, you had a conversation with Mr. Lyon of Stone & Webster, at which time you asked him who was going to install this Westinghouse unit out of which this dispute arose?

A. Wait a minute. I don't believe I said Westinghouse unit.

Q. What did you say?

Plaintiff's Exhibit No. 2—(Continued)
(Testimony of Hernian Barbaglia.)

A. If I said anything to him, I asked him who was going to install the rest of the equipment.

Q. What would you be referring to, then, if not to this unit?

A. No. I was referring to all units, the General Electric and the two Westinghouse units.

Q. Including this unit which is involved in this recent work stoppage?

A. That is the Westinghouse unit, so that would include it, yes.

Q. Mr. Lyon told you that as far as he knew that the employment situation would be the same on that unit, did he not?

A. Something to that effect.

Q. Then you told him that you thought that work was under the Millwrights jurisdiction and that you were going to contend for it, did you not?

A. I didn't say I thought. I told him it was my work and that I was going to contend for it.

Q. And he told you that as far as he was concerned Westinghouse was putting it in and it would be done the same way it had been in the past, is that right?

A. As far as he knew, yes.

Transcript, Volume VII, Page 1011 and 1012:

Q. (By Mr. Binkley): At any rate, at some time prior to December, 1948, you were aware, were you not, that you were going to contend against the I.A.M. machinists for the work of installation of those generators at Redondo, is that right?

Plaintiff's Exhibit No. 2—(Continued)
(Testimony of Herman Barbaglia.)

A. I wasn't contending against any organization. I was contending the work for my organization."

Further affiant saith not.

/s/ JEROME SMITH.

Subscribed and sworn to before me this 17th day of May, 1949.

[Seal] /s/ ANN RAETZ,
Notary Public.

My Commission Expires Aug. 31, 1952.

Phone Michigan 0768 L. A. Mashburn, Sec'y.
Building Trades #6
Los Angeles

Building and Construction Trades Council
Chartered June, 1923, by the
Building and Construction Trades Department
American Federation of Labor
Labor Temple, Room 202 538 Maple Avenue
Los Angeles 13, Calif.

Noted Dec. 14, 1948

W. L. Sheets

Mr. T. A. Lyons

Stone and Webster Engineering Corp.,
601 West 5th Street,
Los Angeles, Calif.

Dear Mr. Lyons:

I have been requested by the Millwrights Local No. 1607 to write you regarding the controversy

Plaintiff's Exhibit No. 2—(Continued)

which existed over the installation of Machinery and equipment on the first portion of the Redondo Steam Plant and to advise you that, as we did before, the jurisdiction of the installation of machinery, in accordance with decisions already rendered, is the work of the Millwright and that they are asking you to make arrangements with Westinghouse or General Electric or whoever is going to install the turbines and work of a similar character, over which the controversy existed before, to have this work done by the Millwrights.

They also advise me that both of these companies, General Electric and Westinghouse, are employing their members throughout the rest of the State of California and they, therefore, see no reason why a continuation of the position taken by these companies formerly should be carried on.

In order to avoid any controversy in this matter, we ask that you see what can be done to see that the Millwrights' jurisdiction is retained throughout your entire job.

Very truly yours,

/s/ L. A. MASHBURN,

Secretary, L. A. Bldg. and
Constr. Trades Council.

Admitted May 17, 1949.

[Endorsed]: Filed May 17, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 109, inclusive, contain the original Petition for an Injunction Under Section 10(1) of the National Labor Relations Act, as Amended; Rule to Show Cause; Respondents' Return to Rule to Show Cause, together with Affidavit of Lloyd A. Mashburn in Opposition to Rule to Show Cause and Exhibits thereto; Order on Decision; Opinion; Memorandum in Opposition to Proposed Findings of Fact, Conclusions of Law, Decree and Temporary Injunction; Findings of Fact and Conclusions of Law; Decree; Notice of Appeal; Designation of Record on Appeal and Affidavit of Service; Motion and Order Extending Time to Docket Appeal; and Designation of Additional Portions of the Record on Appeal with Affidavit of Service which, together with the original plaintiff's Exhibits 1 and 2 and Respondents' Exhibit A, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 12th day of October, A.D. 1949.

EDMUND L. SMITH,

Clerk.

[Seal] By /s/ THEODORE HOCKE,

Chief Deputy.

[Endorsed]: No. 12378. United States Court of Appeals for the Ninth Circuit. Los Angeles Building and Construction Trades Council, and Its Agent Lloyd A. Mashburn; Millwright and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A.F.L., and Its Agent Herman Barbaglia, Appellants, vs. Howard F. LeBaron, Regional Director of the Twenty-first Region of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 14, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12378

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL; and Its Agent LLOYD A. MASHBURN; MILLWRIGHT AND MACHINERY ERECTORS, LOCAL 1607, OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L.; and Its Agent HERMAN BARBAGLIA,

Appellants,

vs.

HOWARD F. LEBARON, Regional Director of the Twenty-first Region of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY

I.

If it was intended by Congress that Section 8(B) (4)(D) Title I of the Labor Management Act of 1947 should prohibit a union and its members to strike to win from an enemy union or from non-union employees contested work opportunities or to refuse to perform services for the employer in that situation, said section of said Act is in that re-

spect unconstitutional and void because in violation of the First, Fifth and Thirteenth Amendments of the Constitution of the United States.

II.

The injunction appealed from was issued upon evidence insufficient to warrant the issuance thereof.

III.

Petitioner below showed no probable, sufficient or any cause or finding thereof to apply for the injunction appealed from.

IV.

The trial court erred in issuing the injunction on proof that petitioner had reasonable cause to believe that the charge was true and a complaint should issue, such showing being sufficient on charges of violation of Sections 8b4A, 8b4B and 8b4C of the National Labor Relations Act as amended, hereinafter called the Act, but not on charges of violation of Section 8b4D.

V.

The trial court had no jurisdiction to entertain a petition for injunction within the time allowed for voluntary compliance with the decision of the Board under Section 10-K of the Act.

VI.

The injunction appealed from was issued to restrain a strike by appellants against the Machinists and Westinghouse for violation of Sections 8-a-1, 8-a-3, 8-b-1 and 8-b-2 of the Act constituting

Unfair Labor Practices under the Act, which excluded members of Appellants from employment; on the evidence the work stoppage is a result of the illegal closed shop contract; an unfair labor practice strike is protected union activity.

VII.

The injunction appealed from is couched in the language of the Act, is so vague and indefinite that it is impossible to ascertain therefrom what conduct is allowed and what conduct is forbidden, and is contrary to Rule 65(d).

VIII.

The injunction appealed from is broader than the dispute involved and decided by the Board, unnecessarily restricts the rights of the union members, compels them to work against their desires and prohibits their withholding their services.

IX.

The Act does not confer jurisdiction on the Board to hear and determine matters such as are presented in this case arising out of a building enterprise purely local in nature and not contributing to the flow of interstate commerce, and hence the District Court had no jurisdiction to entertain the petition.

X.

The Sixth Finding of Fact based on the Second Amended Charge erroneously supports the injunction with matters not considered by the Board or on which there has been a 10-K hearing.

XI.

The acts and conduct of the Respondents below justifying the issuance of the injunction are not found or specified in reasonable detail.

XII.

The injunction is not limited to proper pendente lite relief but finally determines the issues presented by the charges against the unions and grants full and final relief against them without trial.

XIII.

The injunction erroneously omits to preserve to the unions the rights guaranteed by Section 8-C of the Act in failing to exclude from its prohibitions acts which do not involve threats or reprisal or promises of benefit.

Respectfully submitted,

/s/ ARTHUR GARRETT,

Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 24, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF
RECORD FOR APPEAL

To the Clerk of the Above-Entitled Court:

Los Angeles Building and Construction Trades Council; its agent Lloyd A. Mashburn; Millwright and Machinery Erectors, Local 1607, of United Brotherhood of Carpenters and Joiners of America,

A.F.L.; and its agent Herman Barbaglia, appellants herein, herewith designate the following portions of the record and proceedings herein which they deem should be contained in the record on appeal of this cause in the United States Court of Appeals for the Ninth Circuit:

1. Petition for injunction, including Exhibits 1 to 8, inclusive, filed May 3, 1949.
2. Rule to show cause, filed and issued May 3, 1949.
3. Respondents' return to the rule to show cause, filed May 16, 1949.
4. Affidavit of Lloyd A. Mashburn in opposition to rule to show cause, including Exhibits A to E-2, inclusive.
5. Affidavit of Arthur Garrett, filed May 16, 1949.
6. Order on decision, filed May 26, 1949.
7. Opinion of court, filed May 26, 1949.
8. Respondents' memorandum in opposition to proposed findings of fact, conclusions of law, decree and temporary injunction.
9. Findings of fact and conclusions of law lodged May 31, 1949, and filed June 8, 1949.
10. Decree lodged May 31, 1949, and filed June 8, 1949.
11. Notice of Appeal.

12. Clerk's certificate.

The Clerk of the United States Court of Appeals for the Ninth Circuit is requested to print the above designated material as soon as practicable.

Dated this 19th day of October, 1949.

/s/ ARTHUR GARRETT,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 24, 1949.

[Title of Court of Appeals and Cause.]

COUNTER-DESIGNATION OF RECORD

Howard F. LeBaron, Regional Director of the Twenty-first Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, appellee herein, counter designates the following portions of the record herein which he deems should be contained in the printed record before this Court in the above-entitled proceedings in addition to those portions already designated for printing by the appellants:

1. Plaintiff's Exhibit No. 1 on hearing on order to show cause, which consists of a certified copy of the National Labor Relations Board Decision and Determination of Dispute in Case 21-CD-19, In the Matter of Los Angeles Building and Construction Trades Council et al.

2. Plaintiff's Exhibit No. 2 on hearing on order

to show cause, which is a document entitled "Affidavit of Jerome Smith."

/s/ WINTHROP A. JOHNS,
Assistant General Counsel, National Labor Relations Board, Attorney for Appellee.

Dated at Washington, D. C., this 28th day of October, 1949.

[Endorsed]: Filed Nov. 2, 1949.



No. 12379

United States
Court of Appeals
For the Ninth Circuit.

ESTATE OF EDWIN F. GILLETTE, Harriette
O'Neil Gillette, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED
DEC 22 1949

PAUL P. O'BRIEN,
CLERK



No. 12379

United States
Court of Appeals
For the Ninth Circuit.

ESTATE OF EDWIN F. GILLETTE, Harriette
O'Neil Gillette, Executrix,

Petitioner,

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of the United States



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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—cross 118

—redirect 119

—recross 119

Wynne, Mrs. Anna J.

—direct 119

—cross 124

—redirect 125

—recross 125

Witness, Respondent's:

Jenks, Mrs. Delphine

—direct 113

—cross 114

DOCKET NO. 15623

HARRIETTE O'NEIL GILLETTE, Executrix,
of The Estate of EDWIN F. GILLETTE,

Amended Caption:

ESTATE OF EDWIN F. GILLETTE, HAR-
RIETTE O'NEIL GILLETTE, Executrix,
(See Order of 10/20/47)

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES:

For Petitioner:

E. H. McDERMOTT, ESQ.,
WM. M. EMERY, ESQ.,
L. S. SCHMITZ, ESQ.,
J. S. PENNELL, ESQ.,
DANIEL A. TAYLOR, ESQ.

For Respondent:

HAROLD H. HART, ESQ.

DOCKET ENTRIES

1947

Apr. 28—Petition received and filed. Taxpayer
notified. Fee paid.

1947

Sept. 2—Copy of petition served on General Counsel.

Aug. 28—Request for Circuit hearing in Chicago, Ill., filed by taxpayer. 9/12-47 Granted.

Oct. 15—Motion to amend caption filed by taxpayer.

Oct. 20—Order amending caption to read, Estate of Edwin F. Gillette, Harriette O'Neil Gillette, Executrix, Petitioner, entered.

Oct. 30—Answer filed by General Counsel.

Nov. 5—Copy of answer served on taxpayer—Chicago, Illinois.

1948

Apr. 14—Hearing set June 7, 1948 in Chicago, Illinois.

June 10

& 11 Hearing had before Judge Disney on merits. Appearance of Daniel A. Taylor; Subpoena and application of Delphine G. Jenks and Stipulation of facts with exhibits 1 to 4 inclusive filed at hearing. Briefs due 8/10/48. Reply briefs due 9/5/48.

June 29—Transcript of hearing June 10 & 11, 1948 filed.

Aug. 6—Motion for extension to 8/23/48 to file brief, filed by General Counsel. 8/9/48 Granted.

1948

Aug. 9—Brief filed by taxpayer. Copy served.

Aug. 23—Brief filed by General Counsel. Copy served.

Aug. 30—Motion for extension to 9/27/48 to file reply brief, filed by taxpayer. 8/31/48 Granted.

Sept. 27—Motion for extension to 10/7/48 to file reply brief, filed by taxpayer. 9/28/48 Granted.

Oct. 8—Reply brief filed by taxpayer. Copy served.

1949

Jan. 25—Memorandum findings of fact and opinion rendered. Judge Disney. Decision will be entered under Rule 50. Copy served.

Jan. 25—Order amending caption of memorandum findings of fact and opinion, entered.

Feb. 10—Order correcting and modifying findings of fact and opinion, entered.

Apr. 6—Respondent's computation filed.

Apr. 8—Hearing set April 27, 1949 on settlement.

Apr. 26—Consent to settlement filed by taxpayer.

Apr. 27—Decision entered. Judge Disney. Div. 4.

July 22—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by taxpayer.

1949

July 22—Affidavit of service by mail of petition for review filed by taxpayer.

Aug. 22—Motion for extension to 10/20/49 to prepare and transmit record filed by taxpayer.

Aug. 22—Order enlarging time to October 20, 1949 to prepare and transmit record entered.

Sept. 16—Statement of points with proof of service thereon filed by taxpayer.

Sept. 21—Designation of record with proof of service thereon filed by taxpayer.

Sept. 21—Narrative statement of evidence filed. Agreed to.

The Tax Court of The United States

Docket No. 15623

ESTATE OF EDWIN F. GILLETTE, HAR-
RIETTE O'NEIL GILLETTE, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of

deficiency dated June 20, 1947 and as a basis of this proceeding alleges as follows:

1. Harriette O'Neil Gillette is an individual residing at 233 South San Marino Avenue, Pasadena, California, and is the duly qualified and acting executrix of the Estate of Edwin F. Gillette, Deceased, whose residence at the time of his death was at Pasadena, California. The estate tax return for the estate of said decedent was duly filed with the Collector of Internal Revenue for the Sixth District of California, Los Angeles, California.

2. The notice of deficiency (a copy of which is attached hereto and marked "Exhibit A") was mailed to petitioner on June 20, 1947.

3. The taxes in controversy are estate taxes upon the estate of said decedent who died December 10, 1943. Respondent determined a deficiency in the amount of \$40,653.10.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) Respondent erred in including in the gross estate of said decedent certain real property located at the southwest corner of Dearborn and Madison Streets, Chicago, Illinois, transferred into trust by decedent on September 17, 1938.

(b) Respondent erred in including in the gross estate of decedent certain real property located at Lake Beulah, Wisconsin, transferred by decedent on September 17, 1938.

(c) The respondent erred in failing to deduct from the gross estate certain administration expenses including attorneys' fees and expenses, including those incurred or to be incurred in connection with this proceeding.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) On or about September 17, 1938, more than five years prior to his death, the decedent, Edwin F. Gillette, conveyed his one-half interest in certain real estate known as the Hartford Building and located at the southwest corner of Dearborn and Madison Streets, Chicago, Illinois, to his son, Hyde Gillette, as trustee for decedent's four children. Respondent has included such interest in decedent's gross estate as a transfer in contemplation of death. Such transfer was not made to bar possible statutory rights of petitioner, as decedent's intended future wife, in decedent's estate, as asserted by respondent, but was made in consideration of the assumption by the trust of a substantial debt owing by decedent and for other motives associated with life. Such transfer was not made in contemplation of death and is not properly includible in decedent's gross estate.

(b) On or about September 17, 1938, more than five years prior to his death, decedent conveyed his one-half interest in a summer home at Lake Beulah, Wisconsin to his four children. Respondent has

included such interest in decedent's gross estate as a transfer in contemplation of death. Such transfer was not made to bar possible statutory rights of petitioner, as decedent's intended future wife, in decedent's estate, as asserted by respondent, but was made to relieve decedent from the burden and expense of maintaining said property and for other motives associated with life. Such transfer was not made in contemplation of death and is not properly includible in decedent's gross estate.

(c) Since receiving notice of respondent's proposed determination, which was subsequently followed in the notice of deficiency, petitioner has incurred expenses and attorneys' fees and will hereafter incur additional expenses and fees in connection with the determination of estate tax liability. Such expenses and fees are in addition to amounts allowed in the notice of deficiency. The amount of such expenses and fees will be ascertained at or before the conclusion of this proceeding, and such amount is properly deductible from the gross estate.

6. Petitioner has made payment on account of the estate tax liability involved herein to the aforesaid Collector of Internal Revenue in the sum of \$45,064.39 on March 3, 1945 coincident with the filing of the estate tax return and within three years prior to the mailing of the said notice of deficiency and the filing of this Petition.

Wherefore, petitioner prays that this court may hear this proceeding and redetermine petitioner's

correct tax liability and the dates and amounts of any overpayments thereof.

/s/ E. H. McDERMOTT,

/s/ WM. M. EMERY,

/s/ L. S. SCHMITZ,

/s/ J. S. PENNELL,

Counsel for Petitioner.

State of California,

County of Los Angeles—ss.

Harriette O'Neil Gillette, being duly sworn, says that she is the petitioner above named; that she has read the foregoing Petition or had the same read to her, and is familiar with the statements contained therein; and that the statements contained therein are true to the best of her knowledge and belief.

/s/ HARRIETTE O'NEIL GILLETTE,

Subscribed and sworn to before me this 20 day of August 1947.

[Seal]

/s/ LOIS E. VAN NAME,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires March 28, 1950.

EXHIBIT A

Treasury Department
Internal Revenue Service

Office of Internal Revenue Agent in Charge Chi-
cago Division 105 W. Adams St.

Chicago, Illinois

June 20, 1947.

Mrs. Harriette O'Neil Gillette, Executrix of the
Estate of Edwin F. Gillette,
233 South San Marino Avenue,
Pasadena 8, California.

Dear Mrs. Gillette:

You are advised that the determination of the estate tax liability of the above-named estate discloses a deficiency in tax of \$40,653.10, as shown in the statement attached hereto.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Chicago, Illinois, for the attention of Estate Tax

Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

JOSEPH D. NUNAN, JR.

Commissioner,

By O. W. OLSON

Acting Internal Revenue

Agent in Charge.

Enclosures:

Statement

Form of waiver

Form 1276.

mc—T.DB.

Estate of Edwin F. Gillette

6th California
(Transferred to
1st Illinois)

Statement

Harriette O'Neil Gillette, Executrix
of the Estate of Edwin F. Gillette,
233 South San Marino Avenue,
Pasadena 8, California.

	Liability	Assessed	Deficiency
Estate tax	\$85,717.49	\$45,064.39	\$40,653.10

The following statement shows the final determination of this office in connection with the preliminary notice (30 day letter) issued February 18, 1947, by the California division, and after hearing on protest:

Adjustments to net estate

Net estate for basic tax as disclosed by return.....\$149,146.34

Additions to value of gross estate and
decreases in deductions:

Real estate	\$	1,610.00	
Transfers		132,621.05	
Miscellaneous administration expenses		500.00	134,731.05
			<hr/>
			\$283,877.39

Reductions in value of gross estate and
increases in deductions:

Attorneys' fees		232.07
-----------------------	--	--------

Net estate for basic tax as adjusted.....\$283,645.32

Net estate for additional tax as adjusted.....\$323,645.32

Explanation of adjustments:

Real Estate	Returned	Determined
Item 1	\$ 13,390.00	\$ 15,000.00

The determined value of the above item is based upon the fair market value thereof at date of decedent's death, as obtained from sources considered by this office to be reliable.

Transfers	Returned	Determined
Item 7	\$ 1,976.00	\$ 2,000.00
Item 8	7,904.00	8,000.00
Item 11	4,112.50	4,137.50
Item 16	7,050.00	7,000.00
Item 17	5,081.25	5,087.50
Item 21	5,575.00	5,600.00
Item 24	4,875.00	5,000.00
Item 26	14,625.00	14,375.00
Item 27	7,600.00	7,562.50
Item 27(a)	264.02	2,300.00

New—not returned:

Transfer in trust of real estate of southwest corner of Dearborn and Madison Streets, Chicago, Illinois, under date of September 17, 1938.....	0.00	120,621.32
Transfer by warranty deed of real estate in Lake Beulah, Wisconsin, on September 17, 1938	0.00	10,000.00

The determined values of items 7 and 8 are based upon redemption values at date of decedent's death; of item 27(a) upon the fair market value at date of death, as obtained from sources considered by this office to be reliable; of all other of above items, except new items, not returned, upon the mean of high and low sales as of date of death upon the principal stock exchange on which said items are traded, or upon the mean of bid and asked prices in over the counter trading.

It is determined that the transfer, in trust dated September 17, 1938, of the real estate located at the southwest corner Dearborn and Madison Streets, Chicago, Illinois, and the transfer by warranty deed on September 17, 1938, of real estate located at Lake Beulah, Wisconsin, are properly includible in the decedent's gross estate as transfers in contemplation of death under Section 811(c) of the Internal Revenue Code. Said transfers are considered to have been made to bar possible statutory rights of decedent's intended future wife in his estate at the time of his death.

The values of the above-mentioned items of real estate are based upon the fair market value thereof at date of decedent's death as obtained from sources considered by this office to be reliable.

	Returned	Determined
Attorneys' fees	\$ 3,500.00	\$ 3,732.07

Determined in the amount incurred and paid.

	Returned	Determined
Miscellaneous administration expenses		
Item 1	\$ 575.00	\$ 75.00

Determined in the amount incurred and paid.

Computation of Tax

	Returned	Determined
Gross estate for basic tax	\$254,882.86	\$389,113.91
Deductions	105,736.52	105,468.59
Net estate for basic tax.....	\$149,146.34	\$283,645.32
Net estate for additional tax..	\$189,146.34	\$323,645.32
1. Gross basic tax	\$ 7,845.81	
2. Credit for estate and inheritance tax	2,863.15	
3. Gross basic tax, less credit.....	\$ 4,982.66	
4. Credit for gift tax	685.86	

5. Net basic tax	\$ 4,296.80
6. Total gross taxes (basic and additional)	\$ 89,266.50
7. Gross basic tax	7,845.81
8. Gross additional tax	\$ 81,420.69
9. Credit for gift tax	0.00
10. Net additional tax	81,420.69
11. Total tax payable	\$ 85,717.49
Tax assessed per return	45,064.39
Deficiency	\$ 40,653.10

The deficiency bears interest at the rate of 6 per cent per annum from 15 months after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

Filed T.C. U.S., Aug. 28, 1947.

[Title of Tax Court and Cause.]

MOTION TO AMEND CAPTION

Harriette O'Neil Gillette, executrix of the Estate of Edwin F. Gillette, by her counsel, hereby respectfully requests leave to amend, on the face thereof, the petition filed in the above entitled cause, in order to conform said petition to the rules of this court, by striking from the caption of said petition the words "Harriette O'Neil Gillette, Executrix of the Estate of Edwin F. Gillette", and inserting in lieu thereof the words "Estate of Edwin F. Gillette, Harriette O'Neil Gillette, Executrix".

/s/ J. S. PENNELL,

Counsel for Petitioner.

Received and Filed T. C. U. S. Oct. 15, 1947.

[Title of Tax Court and Cause.]

ORDER

On motion of counsel for the petitioner, it is

Ordered, that the caption of the proceeding at the above docket number is amended to read Estate of Edwin F. Gillette, Harriette O'Neil Gillette, Executrix, Petitioner, v. Commissioner of Internal Revenue, Respondent.

[Seal] /s/ BOLTON B. TURNER, km
Judge.

Dated: Washington, D. C., October 20, 1947.
cgh

Served Oct. 22, 1947.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. (a), (b) and (c). Denies that the Commissioner erred as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

5. (a) Denies the allegations contained in subparagraph (a) of paragraph 5 of the petition, except it is admitted that the decedent, Edwin F. Gillette, on September 17, 1938, transferred in trust certain real estate located at the southwest corner of Dearborn and Madison Streets, Chicago, Illinois, to his son, Hyde Gillette, as trustee, and that respondent has determined said transfer was made in contemplation of death under Section 811 (c) of the Internal Revenue Code.

(b) Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition, except it is admitted that on or about September 17, 1938, the decedent transferred by warranty deed certain real estate located at Lake Beulah, Wisconsin, to his children, and that respondent has determined said transfer was made in contemplation of death

under Section 811 (c) of the Internal Revenue Code.

(c) Denies the allegations contained in subparagraph (c) of paragraph 5 of the petition.

6. Denies the allegations contained in paragraph 6 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, respondent prays that the Court re-determine the deficiency herein to be the amount determined by the Commissioner, vis.: estate tax in the amount of \$40,653.10.

/s/ CHARLES OLIPHANT, GWB
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

JOHN D. KILEY,
Division Counsel.
HAROLD H. HART,
Special Attorney, Bureau of
Internal Revenue.

Received and Filed T. C. U. S. Oct. 30, 1947.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel of record that the following facts may be taken as true and correct and may be found by the Court, without prejudice, however, to the right of either party to introduce other and further proof not inconsistent with the facts herein stipulated, and subject to the right of either party to object to the relevancy and materiality of any fact herein stipulated.

1. The petitioner's decedent, Edwin F. Gillette, was born on October 19, 1863, and died on December 10, 1943, a resident of Pasadena, California, leaving him surviving his widow, Harriette O'Neil Gillette; two sons, Hyde and Edwin and two daughters, Helen and Marietta.

2. The estate of Edwin F. Gillette, petitioner herein, was administered in the Superior Court of the State of California in and for the County of Los Angeles.

3. On September 17, 1938, the decedent owned an undivided one-half interest in certain real estate, known as the Hartford Building, located at the southwest corner of Dearborn and Madison Streets, Chicago, Illinois. The other undivided one-half interest was owned by the decedent's sister, Mrs. William S. Jenks. On said date the decedent conveyed his undivided one-half interest to his son,

Hyde Gillette, as Trustee for decedent's four children. A copy of the Trust Deed of Conveyance is attached hereto marked "Exhibit 1" and made a part hereof.

4. On September 17, 1938, the decedent owned an undivided one-half interest in certain real estate, known as the Lake Beulah property, located at Lake Beulah, Wisconsin. The other undivided one-half interest was owned by decedent's sister, Mrs. William S. Jenks. By Warranty Deed dated September 17, 1938, the decedent conveyed his undivided one-half interest in said property to his four children.

5. On September 17, 1938, the decedent owned an undivided one-half interest in certain real estate, known as the Michigan Avenue property, located on South Michigan Avenue, Chicago, Illinois. The other undivided one-half interest was owned by decedent's sister, Mrs. William S. Jenks. On said date the decedent conveyed his undivided one-half interest to his son, Hyde Gillette, as Trustee. A copy of the Trust Deed and amendments thereto are attached hereto, marked "Exhibit 2".

6. The decedent then contemplating inter-marriage with one Harriette Marie O'Neil entered into an antenuptial agreement on September 19, 1938, a copy of which is attached hereto, marked "Exhibit 3" and made a part hereof.

7. The decedent executed a Last Will and Testament on April 24, 1939, a copy of which is attached hereto, marked "Exhibit 4" and made a part hereof.

8. The petitioner filed the decedent's estate tax return on or about March 3, 1945, showing a total estate tax payable of \$45,064.39, which was paid as follows:

9/27/44.....	\$12,158.49
3/10/45.....	32,905.90

Said return did not include as a part of the decedent's gross estate the ownership of any interest in the two tracts of real estate described above, respectively, as the Hartford Building and the Lake Beulah, Wisconsin, property. In his notice of deficiency herein the respondent has included in the value of the petitioner's gross estate the value of said real estate under Section 811 (c) of the Internal Revenue Code.

9. Any additional deductible administration expense, including attorney fees, incurred and paid by the petitioner in the administration of the estate here involved may be determined under Rule 50 of the Court's Rules of Practice.

/s/ DANIEL A. TAYLOR,
Counsel for Petitioner.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel
for Respondent.

EXHIBIT 1

This Indenture made this 17th day of September, A.D. 1938, by and between Edwin F. Gillette, a widower, of Pasadena, California, (hereinafter called the "Settlor"), and Hyde Gillette, of Chicago, Illinois, (hereinafter called the "Trustee"), Witnesseth:

That the Settlor in consideration of the Trustee's assumption of and agreement to pay, but only out of the assets of the trust estate, the indebtedness of the Settlor to his sister, Mrs. William S. Jenks, as evidenced by his certain promissory notes, all as set out in Article V hereof, and for One Dollar (\$1.00) and other good and valuable consideration, does hereby alien, release, remise and convey unto said Trustee an undivided one-half of the following described premises, situated in the City of Chicago, County of Cook and State of Illinois, to-wit:

Lot One (1) of the County Clerk's Division of Block 119 of School Section Addition to Chicago, and being also known as the Southwest (SW) corner of Dearborn and Madison Streets in said City of Chicago;

To Have And To Hold upon the trusts and for the uses and purposes as follows:

Article I. Concerning The Trustee.

(a) The Trustee hereunder shall have full power and authority to sell, transfer, assign and convey all or any part of the property which shall at any

Exhibit 1—(Continued.)

time form a part of the trust estate at such time or times and upon such terms and conditions (either for cash or upon credit) as to the Trustee shall seem best, and to make, execute and deliver all deeds of conveyance and other instruments in writing as may be in the opinion of the Trustee necessary or proper for the best management of the trust estate; to enter into leases, either in praesenti or in futuro, of any real estate which shall form a part of the trust estate at any time, for such rent and for such length of time, not exceeding two hundred (200) years, as the Trustee thinks best.

(b) The Trustee shall also have the power to erect buildings, to change, alter, tear down or make additions to any existing building upon any real estate forming part of the trust estate, to keep the estate insured and to adjust all matters in connection therewith; to retain any investments in real or personal property which shall come into his possession as Trustee hereunder, for such time as he shall deem it for the best interests of the trust so to do, and also to invest and reinvest from time to time any funds coming into his hands as Trustee as aforesaid, and not paid out under the provisions hereof, in such real or personal property, including stocks of corporations, as shall commend themselves to the business judgment of the Trustee without being limited by any statute covering trustee investments; to borrow money from any person or corporation, including the Trustee in his individual

Exhibit 1—(Continued.)

capacity; to pledge, mortgage or otherwise incumber any part of the trust estate for the purpose of securing the money so borrowed; to vote any corporate stock, either in person or by proxy, for any purpose whatsoever, and to consent to any reorganization, consolidation, merger or readjustment of the financial structure or sale of the assets of any corporation, trust or other organization, the securities of which may constitute a portion of the trust estate; to take any action with reference to such securities which in the opinion of the Trustee may be necessary in order to obtain the benefit of any such reorganization, consolidation, merger, readjustment or sale; to exercise any conversion privilege or subscription right given to the Trustee as the owner of any securities forming a part of the trust estate, and to accept and hold as part of the trust estate any securities resulting from any such reorganization, consolidation, merger, readjustment, sale or conversion or subscription; to cause any securities or other property which may at any time form a part of the trust estate to be issued, held or registered in the individual name of the Trustee, or in the name of his nominee, or in such form that title could pass by delivery; to retain undivided interests in real estate, and to invest in undivided interests in real estate, and to maintain, operate, lease and otherwise deal with and dispose of such property jointly with the other owners thereof, and particularly to enter into joint covenants with

Exhibit 1—(Continued.)

respect to the leasing thereof; to join with others in the formation of corporations incorporated under the laws of the State of Illinois or elsewhere, and in connection therewith to contribute such part or all of the trust property as the Trustee may deem advisable to such corporation in return for the shares thereof, such property to be turned in at such value as the Trustee in his unfettered discretion may determine, and to do all other acts in relation to the trust estate, or in relation to the disposition or investment thereof, which in the judgment of the Trustee shall be needful or desirable to the proper and advantageous management of the trust estate so as to protect the same and make the same productive, it being the intention hereof that said Trustee shall have authority to do all things in regard to the trust estate in the same manner and to the same extent as if said Trustee individually were the sole owner thereof.

(c) The Trustee shall be the absolute representative of all persons who may be or become at any time beneficiaries under any of the provisions contained in this agreement, and it shall not be necessary in any suit or legal proceeding of any kind, nature or description whatsoever, which may at any time be brought either against the Trustee hereunder or in his behalf as such Trustee to make party or parties thereto any of said beneficiaries.

(d) No person purchasing any portion of the trust property from the Trustee or lending money

Exhibit 1—(Continued.)

to the Trustee shall be under any obligation to see to the application of the money paid by them to said Trustee.

(e) No person dealing with the Trustee in any manner shall be under any obligation to inquire into the validity, expediency or propriety of any act of the Trustee or into any of the provisions of this agreement.

(f) The Trustee shall be reimbursed out of said trust estate for all reasonable expenses incurred in the management and protection thereof, and the Trustee may be paid a fair and just compensation out of the trust estate for services hereunder if he or it desires compensation for such services.

(g) The Trustee shall also have full power to pledge, mortgage or otherwise encumber any part of the trust estate for the purpose of raising money to remove liens which may be imposed thereon to enforce payment of any Federal or State taxes.

Article II. Payment Of Income.

(a) During the continuance of this trust the said Trustee shall pay the net income from said trust estate in equal shares to Hyde Gillette, Edwin Gillette, Helen Gillette, and Marietta Gillette Will, children of the Settlor, for and during the term of their respective natural lives. From and after the death of any of said children, the income which

Exhibit 1—(Continued.)

would have been payable to him or her had he or she continued to live, shall be payable to such of the lawful descendants of the Settlor and in such shares and proportions and subject to such terms, trusts and conditions as such child in and by his or her last will and testament may appoint and direct; provided that if such deceased child shall leave a spouse living, such child may by his or her will appoint and direct, if such child shall so desire, that any part or all of the income which would have been payable to him or her had he or she continued to live shall be paid to such spouse so long as he or she shall live, or for any shorter period.

(b) In so far as the aforesaid power of appointment of income conferred upon said children shall be void, shall not extend or take effect, or be not exercised, the income which would have been payable to such child had he or she continued to live shall be paid per stirpes to the issue surviving from time to time of such deceased child. If at the time when any payment of income is to be made by said Trustee there shall be surviving no issue of such deceased child, then the income which would have been payable to such deceased child if he or she had continued to live, shall be paid in equal shares to the then surviving children of the Settlor named in Article II, provided, however, that the then surviving issue of any deceased child shall be paid per

Exhibit 1—(Continued.)

stirpes the share of such income which the deceased child would have been paid if living.

(c) All income payments hereunder shall be made in quarterly installments or oftener if convenient.

(d) During the minority or other legal disability of any beneficiary to whom payments of income are herein directed to be made, the Trustee may make such payments in any one or more of the following ways: (1) Directly to said beneficiary; (2) to the legal guardian or conservator of said beneficiary; (3) to any relative of said beneficiary to be expended by such relative for the education and maintenance of such beneficiary; or (4) by him expending the same for the education and maintenance of said beneficiary. The Trustee shall not be required to see to the application of any such payment so made to any of said persons, but his or their receipts therefor shall be a full discharge for the Trustee.

(e) Upon the death of any beneficiary, any accrued, accumulated or undistributed net income which would have been payable to such beneficiary had such beneficiary continued to live, shall be paid to the beneficiary who shall next be entitled upon the death of such deceased beneficiary to receive such income or the principal from which such income was derived.

Exhibit 1—(Continued.)

Article III. Termination of Trust and Distribution of the Trust Estate.

(a) Unless terminated as provided in paragraph (b) of this Article III, the trust hereby created shall terminate in any and the latest event, any provision hereof to the contrary notwithstanding, upon the death of the last survivor of the following named persons, Mrs. William S. Jenks, Hyde Gillette, Edwin Gillette, Helen Gillette, and Marietta Gillette Will.

(b) Notwithstanding any of the provisions hereof, this trust may at any time after the death of Mrs. William S. Jenks be terminated by an instrument in writing signed by a majority of the children of the Settlor named in Article II then living and delivered to the Trustee, the trust actually to terminate on the date fixed in such notice for such termination.

(c) Upon the death of any child of the Settlor named in Article II prior to the termination of this trust, the portion of the trust estate held for such deceased child shall belong to but nevertheless be held by the Trustee in trust for the benefit of, such of the lawful descendants of the Settlor, and in such shares and proportions, and subject to such terms, trusts and conditions as such child in and by his or her last will and testament may direct.

(d) In so far as the aforesaid power of appointment conferred upon said children shall be void, shall not extend or take effect, or be not

Exhibit 1—(Continued.)

exercised, the portion of the trust estate held for such deceased child shall belong to but nevertheless be held by the Trustee in trust for the benefit of the then living lawful issue of such child equally per stirpes. If such deceased child of the Settlor shall leave him or her surviving no lawful issue, then upon the death of such deceased child the portion of the trust estate held for such child shall be added to, and become a part of, the trust estate held for the then surviving children of the Settlor named in Article II, and the then living issue per stirpes of any of the said children of the Settlor who may have died prior thereto.

(e) If, under any provisions of this Article III, any portion of the principal of the trust estate shall become payable to any beneficiary who shall not have attained the age of twenty-one (21) years, then notwithstanding such provisions, the Trustee shall retain such portion in trust for the benefit of such beneficiary and (subject to the provisions of paragraph (d) of Article II) shall pay to him or her so much of the net income of such portion as the Trustee, in his absolute discretion, shall consider reasonably necessary to provide for the comfort, support, maintenance, education and welfare of such beneficiary, and shall accumulate the remainder of such net income, if any, until such beneficiary shall attain the age of twenty-one (21) years, whereupon, the Trustee shall distribute to such beneficiary his or her portion of the principal

Exhibit 1—(Continued.)

of the trust estate in the hands of the Trustee, plus all accumulated income thereon.

(f) Upon the termination of this trust pursuant to either paragraph (a) or paragraph (b) of this Article III, the Trustee shall distribute the principal of said trust estate, including all accumulated income, if any, and all additions to said trust estate as follows:

(1) If all of the children of the Settlor named in Article II are then living, the Trustee shall pay over said estate in equal shares to said children.

(2) If any of said children of the Settlor shall have died prior to the termination of the trust without having exercised the power of appointment given to him or her under this trust and leave lawful issue who are living at the date of such termination, such issue shall be entitled to receive in equal shares per stirpes the share of the trust estate which such deceased child would have received if living.

(3) If any of said children of the Settlor shall have died prior to the termination of the trust and shall have exercised the power of appointment given to him or her under this trust, then the Trustee shall pay over the part of said trust estate subject to such appointment to those persons entitled thereto pursuant to such exercise.

(4) If any of said children of the Settlor shall

Exhibit 1—(Continued.)

have died prior to the termination of the trust without leaving issue surviving at the date of such termination and without having exercised the power of appointment given to him or her under this trust, then the share of said trust estate which such deceased child would have received if living shall be distributed by the Trustee in equal shares to the children of the Settlor named in Article II then living, provided, however, that the then surviving issue of any deceased child shall take per stirpes, the share which such deceased child would have taken if living.

Article IV. General.

(a) Payments to all the beneficiaries hereunder, excepting minors and persons under disability, shall be made only to such beneficiaries in person or upon their personal receipt, and no interest of any beneficiary in the income or principal of the trust estate shall be assignable in anticipation of payment, either by voluntary or involuntary acts of such beneficiary or by operation of law, or be liable in any way for such beneficiary's debts, including alimony.

(b) Any of the provisions of this trust may be altered, changed or modified in any respect and to any extent at any time by an instrument in writing signed by a majority of the children of the Settlor named in Article II then living and delivered to the Trustee; provided, however, that

Exhibit 1—(Continued.)

after the death of any of said children the trust may not be altered, changed or modified in any manner which materially affects the rights of those who take in substitution of any deceased child.

(c) Any Trustee at any time acting hereunder may resign by giving written notice of such resignation to the primary beneficiaries hereunder.

(d) The said Hyde Gillette shall have the right, in the event he resigns as Trustee hereunder, to appoint as Successor Trustee any person or corporation he may select to act as Successor Trustee; provided a majority of the beneficiaries hereunder approve of such selection in writing. In the event of the death, resignation, refusal or inability to act or to further act of said Hyde Gillette as Trustee hereunder without a Successor Trustee having been appointed as above provided, then Edwin Gillette shall be Successor Trustee, and he in turn, in the event of his resignation, shall have a similar right to appoint a Successor Trustee. In the event of his death, resignation, refusal or inability to act or further to act as such Trustee without a Successor Trustee having been appointed as above provided, then The Northern Trust Company, of Chicago, Illinois, shall be Successor Trustee.

(e) Each Successor Trustee acting hereunder shall have and exercise all of the powers, authorities and discretions given to the original Trustee named herein. No Trustee hereunder shall ever be liable for any act or default of his predecessor Trustee

Exhibit 1—(Continued.)

or for any loss sustained by the trust estate through any error of judgment, but only for his, her or its own wilful default.

Article V. Assumption of Certain Indebtedness
of the Settlor.

The Trustee hereby assumes and agrees to pay, but only out of the assets of the trust estate, the indebtedness of the Settlor to his sister, Mrs. William S. Jenks, as evidenced by the Settlor's two promissory notes totalling Forty Thousand Dollars (\$40,000.00) plus the accrued and unpaid interest thereon amounting to approximately \$4,000.00, and also all interest which may accrue thereon in the future.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

[Seal] /s/ EDWIN F. GILLETTE,

[Seal] /s/ HYDE GILLETTE,

As Trustee.

State of Illinois,
County of Cook—ss.

I, Corrine Golightly, a Notary Public in and for the said County, in the State aforesaid, Do Hereby Certify that Edwin F. Gillette, a widower, and Hyde Gillette, personally known to me to be the same persons whose names are subscribed to the

Exhibit 1—(Continued)

foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 17th day of September, A.D. 1938.

/s/ CORINNE GOLIGHTLY,

Notary Public.

EXHIBIT 2

This Indenture made this 17th day of September, A.D. 1938, by and between Edwin F. Gillette, a widower, of Pasadena, California, (hereinafter called the "Settlor"), and Hyde Gillette, of Chicago, Illinois, (hereinafter called the "Trustee"), Witnesseth:

That the Settlor in consideration of the sum of Ten Dollars (\$10.00) and for other good and valuable consideration, does hereby alien, release, remise and convey unto said Trustee an undivided one-half of the following described premises, situated in the City of Chicago, County of Cook, and State of Illinois, to-wit:

Those parts of Lots Five (5) Six (6) Seven (7) and Eight (8) in Block Twenty (20) in Fractional Section Fifteen (15) Addition to Chicago, bounded and described as follows: Commencing at the South-

Exhibit 2—(Continued)

east corner of the North one-third of said lot Eight (8) in Block Twenty (20) aforesaid, thence North on the West line of Michigan Avenue and the East line of said Lots Five (5) and Eight (8) Sixty (60) feet; thence West on a line parallel with the South line of said Lots Eight (8) and Seven (7), Two Hundred (200) feet; thence South on a line parallel with the East line of said Lots Five (5) and Eight (8) Sixty (60) feet; thence East on a line parallel with the South line of said Lots Seven (7) and Eight (8) to the place of beginning, containing a piece of ground Sixty (60) feet front on Michigan Avenue by Two Hundred (200) feet more or less in depth; also known as Lot Five (5) in the Assessors Division of the North Half ($N\frac{1}{2}$) of the South Two-thirds ($S. \frac{2}{3}$) of Block Twenty (20) in Fractional Section Fifteen (15) Addition to Chicago;

To Have And To Hold upon the trusts and for the uses and purposes as follows:

Article I. Concerning the Trustee.

(a) The Trustee hereunder shall have full power and authority to sell, transfer, assign and convey all or any part of the property which shall at any time form a part of the trust estate at such time or times and upon such terms and conditions (either for cash or upon credit) as to the Trustee shall seem best, and to make, execute and deliver all deeds of conveyance and other instruments in

Exhibit 2—(Continued)

writing as may be in the opinion of the Trustee necessary or proper for the best management of the trust estate; to enter into leases, either in praesenti or in futuro, of any real estate which shall form a part of the trust estate at any time, for such rent and for such length of time, not exceeding two hundred (200) years, as the Trustee thinks best.

(b) The Trustee shall also have the power to erect buildings, to change, alter, tear down or make additions to any existing building upon any real estate forming part of the trust estate, to keep the estate insured and to adjust all matters in connection therewith; to retain any investments in real or personal property which shall come into his possession as Trustee hereunder, for such time as he shall deem it for the best interests of the trust so to do, and also to invest and reinvest from time to time any funds coming into his hands as Trustee as aforesaid, and not paid out under the provisions hereof, in such real or personal property, including stocks of corporations, as shall commend themselves to the business judgment of the Trustee without being limited by any statute covering trustee investments; to borrow money from any person or corporation, including the Trustee in his individual capacity; to pledge, mortgage or otherwise incumber any part of the trust estate for the purpose of securing the money so borrowed; to vote any corporate stock, either in

Exhibit 2—(Continued)

person or by proxy, for any purpose whatsoever, and to consent to any reorganization, consolidation, merger or readjustment of the financial structure or sale of the assets of any corporation, trust or other organization, the securities of which may constitute a portion of the trust estate; to take any action with reference to such securities which in the opinion of the Trustee may be necessary in order to obtain the benefit of any such reorganization, consolidation, merger, readjustment or sale; to exercise any conversion privilege or subscription right given to the Trustee as the owner of any securities forming a part of the trust estate, and to accept and hold as part of the trust estate any securities resulting from any such reorganization, consolidation, merger, readjustment, sale or conversion or subscription; to cause any securities or other property which may at any time form a part of the trust estate to be issued, held or registered in the individual name of the Trustee, or in the name of his nominee, or in such form that title could pass by delivery; to retain undivided interests in real estate, and to invest in undivided interests in real estate, and to maintain, operate, lease and otherwise deal with and dispose of such property jointly with the other owners thereof, and particularly to enter into joint covenants with respect to the leasing thereof; to join with others in the formation of corporations incorporated under the laws of the State of Illinois or elsewhere, and

Exhibit 2—(Continued)

in connection therewith to contribute such part or all of the trust property as the Trustee may deem advisable to such corporation in return for the shares thereof, such property to be turned in at such value as the Trustee in his unfettered discretion may determine, and to do all other acts in relation to the trust estate, or in relation to the disposition or investment thereof, which in the judgment of the Trustee shall be needful or desirable to the proper and advantageous management of the trust estate so as to protect the same and make the same productive, it being the intention hereof that said Trustee shall have authority to do all things in regard to the trust estate in the same manner and to the same extent as if said Trustee individually were the sole owner thereof.

(c) The Trustee shall be the absolute representative of all persons who may be or become at any time beneficiaries under any of the provisions contained in this agreement, and it shall not be necessary in any suit or legal proceeding of any kind, nature or description whatsoever, which may at any time be brought either against the Trustee hereunder or in his behalf as such Trustee to make party or parties thereto any of said beneficiaries.

(d) No person purchasing any portion of the trust property from the Trustee or lending money to the Trustee shall be under any obligation to see to the application of the money paid by them to said Trustee.

Exhibit 2—(Continued)

(e) No person dealing with the Trustee in any manner shall be under any obligation to inquire into the validity, expediency or propriety of any act of the Trustee or into any of the provisions of this agreement.

(f) The Trustee shall be reimbursed out of said trust estate for all reasonable expenses incurred in the management and protection thereof, and the Trustee may be paid a fair and just compensation out of the trust estate for services hereunder if her or it desires compensation for such services.

(g) The Trustee shall also have full power to pledge, mortgage or otherwise encumber any part of the trust estate for the purpose of raising money to remove liens which may be imposed thereon to enforce payment of any Federal or State taxes.

Article II. Payment of Income.

(a) During the life of the Settlor, the Trustee shall, throughout the continuance of the trust, pay the net income from the trust estate as follows:

The Settlor has conveyed in trust one-half interest in certain premises at the Southwest corner of Madison and Dearborn Streets, Chicago, Illinois, known as the Hartford Building (hereinafter called the "Hartford Building Trust"), and the Trustee of said Hartford Building Trust assumed and agreed to pay a certain indebtedness of the Settlor

Exhibit 2—(Continued)

to Mrs. William S. Jenks. There is no definite assurance that the income from said Hartford Building Trust will be sufficient to pay the interest on the indebtedness so assumed. In any year throughout the life of Mrs. William S. Jenks, when the Trustee of the Hartford Building Trust does not pay to her on account of interest on the indebtedness assumed at least \$1,000.00 then the Trustee hereunder shall pay to Mrs. William S. Jenks, out of the net income of the trust estate, the sum of \$1,000.00 or such portion thereof as, when added to such income, if any, as Mrs. Jenks does receive from the Hartford Building Trust equals the sum of \$1,000.00, and the balance of the net income, or all of the net income, as the case may be, shall be paid to the Settlor.

(b) From and after the death of the Settlor, the said Trustee shall, during the continuance of the trust, pay the net income from the trust estate as follows:

(1) To Mrs. William S. Jenks, if she survives the Settlor, such a portion thereof per year but not in excess of \$1,000.00 as may be necessary to assure an income to her of \$1,000.00 per year from either this trust or the Hartford Building Trust mentioned in paragraph (a) of this Article II.

(2) The Settlor is now a widower, but if he should marry and leave a widow him surviving who was living with him as his wife at the time

Exhibit 2—(Continued)

of his death, the Trustee shall pay to such widow for and during the term of her natural life the sum of Fifteen Hundred Dollars (\$1,500.00) per year.

(3) The Trustee shall pay all of the said net income not required to meet the payments provided for in sub-paragraphs (1) and (2) of this paragraph (b) in equal shares to Hyde Gillette, Edwin Gillette, Helen Gillette and Marietta Gillette Will, children of the Settlor for and during the term of their respective natural lives.

(4) From and after the death of Mrs. William S. Jenks, if she survives the Settlor, and the death of the widow of the Settlor, if he leaves a widow him surviving as aforesaid, or if neither Mrs. William S. Jenks nor such a widow survives the Settlor, then from and after the death of the Settlor, the Trustee shall pay all of said net income in equal shares to Hyde Gillette, Edwin Gillette, Helen Gillette and Marietta Gillette Will, children of the Settlor for and during the term of their respective natural lives.

(c) From and after the death of any of the children of the Settlor named in this Article II the income which would have been payable to him or her hereunder had he or she continued to live, shall be payable to such of the lawful descendants of the Settlor and in such shares and proportions and subject to such terms, trusts and conditions

Exhibit 2—(Continued)

as such child in and by his or her last will and testament may appoint and direct; provided that if such deceased child shall leave a spouse living, such child may by his or her will appoint and direct, if such child so desires, that any part or all of the income which would have been payable to him or her had he or she continued to live shall be paid to such spouse so long as he or she shall live or for any shorter period.

(d) In so far as the aforesaid power of appointment of income conferred upon said children shall be void, shall not extend or take effect, or be not exercised, the income which would have been payable to such child had he or she continued to live shall be paid per stirpes to the issue surviving from time to time of such deceased child. If at the time when any payment of income is to be made by said Trustee there shall be surviving no issue of such deceased child, then the income which would have been payable to such deceased child if he or she had continued to live, shall be paid in equal shares to the then surviving children of the Settlor named in Article II, provided, however, that the then surviving issue of any deceased child shall be paid per stirpes the share of such income which the deceased child would have been paid if living.

(e) All income payments hereunder shall be made in quarterly installments or oftener if convenient.

Exhibit 2—(Continued)

(f) During the minority or other legal disability of any beneficiary to whom payments of income are herein directed to be made, the Trustee may make such payments in any one or more of the following ways: (1) Directly to said beneficiary; (2) to the legal guardian or conservator of said beneficiary; (3) to any relative of said beneficiary to be expended by such relative for the education and maintenance of such beneficiary; or (4) by him expending the same for the education and maintenance of said beneficiary. The Trustee shall not be required to see to the application of any such payment so made to any of said persons, but his or their receipts therefor shall be a full discharge for the Trustee.

(g) Upon the death of any beneficiary, any accrued, accumulated or undistributed net income which would have been payable to such beneficiary had such beneficiary continued to live, shall be paid to the beneficiary who shall next be entitled upon the death of such deceased beneficiary to receive such income or the principal from which such income was derived.

Article III. Termination of Trusts and
Distribution of the Trust Estate.

(a) Unless terminated as provided in paragraph (b) of this Article III, the trust hereby created shall terminate in any and the latest event, any provisions hereof to the contrary notwithstanding.

Exhibit 2—(Continued)

ing, on the death of the last survivor of the following named persons: Mrs. William S. Jenks, Hyde Gillette, Edwin Gillette, Helen Gillette, Marietta Gillette Will and the widow of the Settlor, if he leaves a widow him surviving who is entitled to receive income hereunder.

(b) At any time after the death of the widow of the Settlor, if he should marry and leave a widow him surviving who is entitled to receive income hereunder, and the death of Mrs. William S. Jenks, or at any time after the death of the Settlor if neither such a widow nor Mrs. William S. Jenks survives the Settlor, this trust may be terminated, any provisions hereof to the contrary notwithstanding, by an instrument in writing signed by a majority of the children of the Settlor named in Article II then living, and delivered to the Trustee, the trust actually to terminate on the date fixed in such notice for such termination.

(c) Upon the death of any child of the Settlor named in Article II prior to the termination of this trust, the portion of the trust estate held for such deceased child shall belong to, but nevertheless be held by the Trustee in trust for the benefit of, such of the lawful descendants of the Settlor, and in such shares and proportions, and the subject to such terms, trusts and conditions as such child in and by his or her last will and testament may direct.

Exhibit 2—(Continued)

(d) In so far as the aforesaid power of appointment conferred upon said children shall be void, shall not extend or take effect, or be not exercised, the portion of the trust estate held for such deceased child shall belong to, but nevertheless be held by the Trustee in trust for the benefit of, then then living lawful issue of such child equally per stirpes. If such deceased child of the Settlor shall leave him or her surviving no lawful issue, then upon the death of such deceased child the portion of the trust estate held for such child shall be added to, and become a part of, the trust estate held for the then surviving children of the Settlor named in Article II, and then then living issue per stirpes of any of the said children of the Settlor who may have pdied prior thereto.

(e) If, under any provisions of this Article III, any portion of the principal of the trust estate shall become payable to any beneficiary who shall not have attained the age of twenty-one (21) years, then notwithstanding such provisions, the Trustee shall retain such portion in trust for the benefit of such beneficiary and (subject to the provisions of paragraph (f) of Article II) shall pay to him or her so much of the net income of such portion as the Trustee, in his absolute discretion, shall consider reasonably necessary to provide for the comfort, support, maintenance, education and welfare of such beneficiary, and shall accumulate the remainder of such net income, if any, until such

Exhibit 2—(Continued)

beneficiary shall attain the age of twenty-one (21) years, whereupon, the Trustee shall distribute to such beneficiary his or her portion of the principal of the trust estate in the hands of the Trustee, plus all accumulated income thereon.

(f) Upon the termination of this trust pursuant to either paragraph (a) or paragraph (b) of this Article III, the Trustee shall distribute the principal of said trust estate, including all accumulated income, if any, and all additions to said trust estate as follows:

(1) If all of the children of the Settlor named in Article II are then living, the Trustee shall pay over said estate in equal shares to said children.

(2) If any of said children of the Settlor shall have died prior to the termination of the trust without having exercised the power of appointment given to him or her under this trust and leave lawful issue who are living at the date of such termination, such issue shall be entitled to receive in equal shares per stirpes the share of the trust estate which such deceased child would have received if living.

(3) If any of said children of the Settlor shall have died prior to the termination of the trust and shall have exercised the power of appointment given to him or her under this trust, then the Trustee shall pay over the part of said trust estate

Exhibit 2—(Continued)

subject to such appointment to those persons entitled thereto pursuant to such exercise.

(4) If any of said children of the Settlor shall have died prior to the termination of the trust without leaving issue surviving at the date of such termination and without having exercised the power of appointment given to him or her under this trust, then the share of said trust estate which such deceased child would have received if living shall be distributed by the Trustee in equal shares to the children of the Settlor named in Article II then living, provided, however, that the then surviving issue of any deceased child shall take per stirpes, the share which such deceased child would have taken if living.

Article IV. General.

(a) Payments to all the beneficiaries hereunder, excepting minors and persons under disability, shall be made only to such beneficiaries in person or upon their personal receipt, and no interest of any beneficiary in the income or principal of the trust estate shall be assignable in anticipation of payment, either by voluntary or involuntary acts of such beneficiary or by operation of law, or be liable in any way for such beneficiary's debts, including alimony.

(b) After the death of the Settlor, Mrs. William S. Jenks, and the widow of the Settlor, if he

Exhibit 2—(Continued)

leaves a widow him surviving who is entitled to receive income hereunder, any of the provisions of this trust may be altered, changed or modified in any respect and to any extent at any time by an instrument in writing signed by a majority of the children of the Settlor named in Article II then living and delivered to the Trustee; provided, however, that after the death of any of said children the trust may not be altered, changed or modified in any manner which materially affects the rights of those who take in substitution of any deceased child.

(c) Any Trustee at any time acting hereunder may resign by giving written notice of such resignation to the primary beneficiaries hereunder.

(d) The said Hyde Gillette shall have the right, in the event he resigns as Trustee hereunder, to appoint as Successor Trustee any person or corporation he may select to act as Successor Trustee; provided a majority of the beneficiaries hereunder approve of such selection in writing. In the event of the death, resignation, refusal or inability to act or to further act of said Hyde Gillette as Trustee hereunder without a Successor Trustee having been appointed as above provided, then Edwin Gillette shall be Successor Trustee, and he in turn, in the event of his resignation, shall have a similar right to appoint a Successor Trustee. In the event of his death, resignation, refusal or inability to act

Exhibit 2—(Continued)

or further to act as such Trustee without a Successor Trustee having been appointed as above provided, then The Northern Trust Company, of Chicago, Illinois, shall be Successor Trustee.

(e) Each Successor Trustee acting hereunder shall have and exercise all of the powers, authorities and discretions given to the original Trustee named herein. No Trustee hereunder shall ever be liable for any act or default of his predecessor Trustee or for any loss sustained by the trust estate through any error of judgment, but only for his, her or its own wilful default.

(f) This trust may be terminated or any of the provisions thereof may be altered, changed or modified in any respect at any time hereafter by an instrument in writing signed by the Settlor and delivered to the Trustee; provided, however, that said trust shall not be actually so terminated or modified until on the date fixed in such notice so given to the Trustee, and in no event until after the expiration of thirty (30) days from the receipt of such notice by the Trustee.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

[Seal] /s/ EDWIN F. GILLETTE,

[Seal] /s/ HYDE GILLETTE,

As Trustee.

Exhibit 2—(Continued)

State of Illinois,
County of Cook—ss.

I, Corinne Golightly, a Notary Public in and for the said County, in the State aforesaid, Do Hereby Certify that Edwin F. Gillette, a widower, and Hyde Gillette, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 17th day of September, A.D. 1938.

/s/ CORINNE GOLIGHTLY,
Notary Public.

To: Hyde Gillette, Trustee under Trust Indenture dated September 17, 1938, and recorded with the Recorder of Deeds of Cook County, Illinois, on September 19, 1938, as Document No. 12211894.

By Indenture dated September 17, 1938, I, the undersigned Edwin F. Gillette, Settlor in the Trust Indenture above described, conveyed to you as Trustee an undivided one-half ($1/2$) of the following described premises situated in the City of Chicago, County of Cook and State of Illinois, to-wit:

Exhibit 2—(Continued)

Those parts of Lots Five (5) Six (6) Seven (7) and Eight (8) in Block Twenty (20) in Fractional Section Fifteen (15) Addition to Chicago, bounded and described as follows: Commencing at the Southeast corner of the North one-third of said Lot Eight (8) in Block Twenty (20) aforesaid, thence North on the West line of Michigan Avenue and the East line of said Lots Five (5) and Eight (8) Sixty (60) feet; thence West on a line parallel with the South line of said Lots Eight (8) and Seven (7), Two Hundred (200) feet; thence South on a line parallel with the East line of said Lots Five (5) and Eight (8) Sixty (60) feet; thence East on a line parallel with the South line of said Lots Seven (7) and Eight (8) to the place of beginning, containing a piece of ground Sixty (60) feet front on Michigan Avenue by Two Hundred (200) feet more or less in depth; also known as Lot Five (5) in the Assessors Division of the North Half (N. $\frac{1}{2}$) of the South Two-thirds (S. $\frac{2}{3}$) of Block Twenty (20) in Fractional Section Fifteen (15) Addition to Chicago, to have and to hold upon the trusts and for the uses and purposes set forth in said Indenture.

At the time of the execution of said Trust Indenture I, the said Edwin F. Gillette, was a widower as therein stated, but at that time I contemplated marrying Harriette Marie O'Neil, who was then over 21 years of age, and therefore there was inserted in said Indenture a provision that if

Exhibit 2—(Continued)

the Settlor should marry and leave a widow him surviving, who was living with him as his wife at the time of his death, the Trustee should pay to such widow for and during the term of her natural life the sum of Fifteen Hundred Dollars (\$1,500.00) per year. On October 29, 1938, I did marry the said Harriette Marie O'Neil.

You Are Hereby Notified that I, the undersigned Edwin F. Gillette, Settlor in the Trust Agreement above described, in order to make it clear that the person who was intended to be provided for in said Indenture by the use of the words "such widow" was Harriette Marie O'Neil, who is my present wife, Harriette O'Neil Gillette, and no other person, do hereby, in pursuance of the power in me vested by the terms of said Trust Indenture, modify and alter the provisions of said Trust Indenture in the following respects:

(1) Strike out paragraph (a) of Article III which reads as follows:

"(a) Unless terminated as provided in paragraph (b) of this Article III, the trust hereby created shall terminate in any and the latest event, any provisions hereof the contrary notwithstanding, on the death of the last survivor of the following named persons: Mrs. William S. Jenks, Hyde Gillette, Edwin Gillette, Helen Gillette, Marietta Gillette Will and the widow of the Settlor, if he leaves a widow him surviving who is entitled to receive income hereunder."

Exhibit 2—(Continued)

and insert in lieu thereof a new paragraph (a) to be and read as follows:

“(a) Unless terminated as provided in paragraph (b) of this Article III, the trust hereby created shall terminate in any and the latest event, any provisions hereof to the contrary notwithstanding on the death of the last survivor of the following named persons: Mrs. William S. Jenks, Hyde Gillette, Edwin Gillette, Helen Gillette, Marietta Gillette Will, and my present wife, Harriette O’Neil Gillette. Wherever in this Trust Indenture the words “the widow of the Settlor,” “a widow,” or “such widow” are used the same are intended to refer to said Harriette O’Neil Gillette and to no other person.”

This modification of said Indenture shall become effective on the thirty-first (31st) day after a signed copy hereof has been delivered to and received by you.

The Settlor, Edwin F. Gillette and Harriette O’Neil Gillette, his wife, hereby agree that all of the provisions of said Trust Indenture dated September 17, 1938, not modified by this agreement shall remain and continue in full force and effect in every respect, and said Indenture as herein modified is hereby ratified, approved and confirmed in every respect as if the modification herein set forth had been originally inserted therein, and the undersigned Edwin F. Gillette and Harriette O’Neil Gillette, his wife, for the purpose of further assurance hereby convey and quitclaim to said Hyde

Exhibit 2—(Continued)

Gillette as Trustee the said premises described on page 1 of this instrument upon the trusts and for the uses and purposes set forth in said Indenture dated September 17, 1938 and recorded with the Recorder of Deeds of Cook County, Illinois, on September 19, 1938, as Document No. 12211894.

In Witness Whereof, we, the said Edwin F. Gillette and Harriette O'Neil Gillette, have hereunto set our hands and seals this 8th day of March, A.D. 1939.


 /s/ EDWIN F. GILLETTE.

[Seal] /s/ HARRIETTE O'NEIL
 GILLETTE,

State of California,
County of Los Angeles—ss.

I, M. L. Davidson, a Notary Public in and for said County in the State aforesaid, Do Hereby Certify that Edwin F. Gillette and Harriette O'Neil Gillette, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 8th day of March, A.D. 1939.

[Seal] /s/ M. L. DAVIDSON,
Notary Public.

Exhibit 2—(Continued)

The undersigned, Hyde Gillette, as Trustee as aforesaid, does hereby acknowledge receipt of the above instrument modifying and altering the Indenture above referred to, and does hereby consent to and accept such modification.

Witness my hand and seal this 11th day of March, A.D. 1939.

[Seal] /s/ HYDE GILLETTE.

State of Illinois,
County of Cook—ss.

I, E. J. Kilcullen, a Notary Public in and for said County in the State aforesaid, Do Hereby Certify that Hyde Gillette, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed the said instrument as his free and voluntary act and for the uses and purposes therein set forth.

Given under my hand and notarial seal this 11th day of March, A.D. 1939.

/s/ E. J. KILCULLEN,
Notary Public.

Exhibit 2—(Continued)

To: Hyde Gillette, Trustee under the Trust Indenture dated September 17, 1938, and recorded with the Recorder of Deeds of Cook County, Illinois, on September 19, 1938, as Document No. 12211894.

By Indenture dated September 17, 1938, I, the undersigned Edwin F. Gillette, Settlor in the Trust Indenture above described, conveyed to you as Trustee an undivided one-half of the following described premises situated in the City of Chicago, County of Cook and State of Illinois, to-wit:

Those parts of Lots Five (5) Six (6) Seven (7) and Eight (8) in Block Twenty (20) in Fractional Section Fifteen (15) Addition to Chicago, bounded and described as follows: Commencing at the Southeast corner of the North one-third of said Lot Eight (8) in Block Twenty (20) aforesaid, thence North on the West line of Michigan Avenue and the East line of said Lots Five (5) and Eight (8) Sixty (60) feet; thence West on a line parallel with the South line of said Lots Eight (8) and Seven (7), Two Hundred (200) feet; thence south on a line parallel with the East line of said Lots Five (5) and Eight (8) Sixty (60) feet; thence East on a line parallel with the South line of said Lots Seven (7) and Eight (8) to the place of beginning, containing a piece of ground Sixty (60) feet front on Michigan Avenue by Two Hundred (200) feet more or less in depth; also known as Lot Five (5) in the As-

Exhibit 2—(Continued)

sessors Division of the North Half (N. $\frac{1}{2}$) of the South Two-thirds ($S\frac{1}{2}$) of Block Twenty (20) in Fractional Section Fifteen (15) addition to Chicago; to have and to hold upon the trusts and for the uses and purposes set forth in said Indenture.

At the time of the execution of said Trust Indenture, the above described real estate was under a long-term lease at an annual net rental of \$12,000 per year, my one-half interest in said rentals being \$6,000 per year. The lessee under said lease had an option to purchase the real estate. As you know, the lessee exercised said option during the year 1939, and as Trustee you received one-half of the proceeds from the sale of said real estate.

On the sale of said property a capital gain was realized, and as a result of this and the tax on the other income from the trust estate, I became obligated to pay income taxes of \$4,065.63 for the calendar year 1939. Income taxes in this amount were not contemplated at the time I executed said Trust Indenture.

I understand from you that during present conditions in the financial market it has been almost impossible for you to safely invest the proceeds received by you from the sale of the one-half interest in said real estate so as to yield for me as beneficiary of the Trust an annual income of \$6,000.

In view of the foregoing you are hereby notified as follows:

Exhibit 2—(Continued)

1. That I, the undersigned, Edwin F. Gillette, Settlor in the Trust Indenture above described, in pursuance of the powers in me vested by the terms thereof, do hereby terminate the Trust thereby created in so far as it relates to the sum of \$4,065.63, this being the amount of the income taxes I became obligated to pay for the calendar year 1939.

2. That I, the undersigned, Edwin F. Gillette, Settlor in the Trust Indenture above described in pursuance of the powers in me vested by the terms thereof, do hereby alter, modify and change said Trust Indenture by adding at the end of Paragraph (a) of Article II a new sentence as follows:

“It is the intention of the Settlor that the payments to him from said Trust Estate shall be at least \$6,000 per year over and above the amount the Settlor is required to pay each year as Federal Income Taxes on the income payable to him by the Trustee from the Trust Estate and on capital gains realized by the Trustee, and if the net income payable to the Settlor from said Trust Estate (after provision has been made for Federal Income Taxes as aforesaid) is in any year less than \$6,000, the Trustee shall pay to the Settlor so much of the principal of the Trust Estate as may be necessary to make up the difference between such net income payable to the Settlor from the Trust Estate and \$6,000; provided, however, that if under the provisions of this Paragraph (a) any income is payable

Exhibit 2—(Continued)

to Mrs. William S. Jenks in any year, such sums so paid to her shall be deducted from the \$6,000 which in that year would otherwise be payable to the Settlor.”

This modification of said Indenture dated the 17th day of September, A.D. 1938, shall become effective on the 31st day after a signed copy thereof has been delivered to and received by you.

In Witness Whereof, I, the undersigned, Edwin F. Gillette, have hereunto set my hand and seal this Third day of September, A.D. 1940.

[Seal] /s/ EDWIN F. GILLETTE.

State of Illinois,
County of Cook—ss.

I, Donald P. Foudriat, a Notary Public in and for the said County, in the State aforesaid, do hereby certify that Edwin F. Gillette, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial seal this 3rd day of September, A.D. 1940.

[Seal] /s/ DONALD P. FOUDRIAT,
Notary Public.

My Commission Expires February 11th, 1944.

Exhibit 2—(Continued)

The undersigned, Hyde Gillette, as Trustee as aforesaid, does hereby acknowledge receipt of the above instrument modifying and altering the Indenture above referred to, and does hereby consent to and accept such modification.

Witness my hand and seal this 3rd day of September, A.D. 1940.

[Seal] /s/ HYDE GILLETTE.

State of Illinois,
County of Cook—ss.

I, Donald P. Foudriat, a Notary Public in and for said County in the State aforesaid, do hereby certify that Hyde Gillette, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed the said instrument as his free and voluntary act and for the uses and purposes therein set forth.

Given under my hand and notarial seal this 3rd day of September, A.D. 1940.

[Seal] /s/ DONALD P. FOUDRIAT,
Notary Public.

My Commission Expires February 11th, 1944.

Exhibit 2—(Continued)
(Copy)

Modification of Indenture of Trust

Dated September 17, 1938

October 19, 1942

Mr. Hyde Gillette
135 S. LaSalle St.
Chicago, Illinois

Dear Hyde:

Under the indenture of trust dated September 17, 1938, and recorded with the Recorder of Deeds of Cook County, Illinois, as document number 12211894, I understand there is some question as to whether you have the express authority to delegate your powers as trustee to any other person, and since you plan to enter the United States Army, I can readily understand that it is important that you be able to do this.

As the settlor of said trust I hereby expressly authorize you, commencing on the thirty-first day after you receive this letter, to delegate to any other person or persons any and all powers, discretionary or ministerial, vested in you as such trustee, notwithstanding any omission of such authority of any contrary power, if any, in said indenture of trust.

Affectionately yours,

EDWIN F. GILLETTE, (Sgd)

EDWIN F. GILLETTE.

Exhibit 2—(Continued)

State of Illinois,
County of Cook—ss.

The undersigned, Hyde Gillette, being first duly sworn, deposes and says: That he is the trustee under indenture of trust dated September 17, 1938, and recorded with the Recorder of Deeds of Cook County, Illinois, as document number 12211894, and that on October . . , 1942, he received the instrument signed by Edwin F. Gillette to which this affidavit is attached, modifying and altering the indenture of trust referred to in said instrument and this affidavit, and the undersigned as such trustee does hereby consent to and accept such modification.

.....
Trustee under Indenture of
Trust Dated September 17,
1948.

Subscribed and sworn to before me this . . day
of October, A.D. 1942.

.....
Notary Public, Cook County,
Illinois.

My commission expires.....

EXHIBIT 3

This indenture, made this 19th day of September, A.D. 1938, by Edwin F. Gillette, residing in Pasadena, California, (herein called First Party), and Harriette Marie O'Neil, residing at Pasadena, California, (herein called Second Party), witnesseth:

Whereas, a marriage is contemplated by and between the parties hereto; and

Whereas, Second Party has been fully informed as to what her statutory rights would be in First Party's property as the wife or widow of First Party; and

Whereas, First Party has recently made the following conveyances of certain properties owned by him:

(1) He has recently given his undivided one-half interest in certain real estate located at the Southwest Corner of Madison and Dearborn Streets, Chicago, Illinois, known as the Hartford Building, in trust to his four children and no longer has any interest therein. This property was owned jointly with First Party's sister, Mrs. William S. Jenks. There is an \$85,000.00 mortgage against the entire property. During the past year First Party has received not more than \$1,500.00 of income from the property. After deducting one-half of the amount of the \$85,000.00 mortgage, it is estimated by the First Party that his one-half interest in said property was worth not more than \$175,000.00. First Party is indebted to his sister, Mrs. William S. Jenks on two promissory notes totalling \$40,000.00 and there is accrued and unpaid interest on said notes amounting to approximately \$4,000.00. The Trustee to whom this property has been conveyed has assumed First Party's indebtedness to his sister and it is contemplated that she will re-

lease First Party from any personal liability to pay the same;

(2) He has recently conveyed his undivided one-half interest in certain property located in the 1000 Block South Michigan Avenue, Chicago, Illinois, in trust for the ultimate benefit of his four children. This property is under long term lease to Edward J. Lehmann, et al. First Party's share of rent under said lease was \$6,000.00 per year. This property will be hereinafter referred to as the Michigan Avenue Property. It is estimated by First Party that a one-half interest in this property was worth not more than \$100,000.00. Under the terms of the trust First Party is to receive the net income during his life subject to a provision that under certain conditions \$1,000.00 per year of the net income of the trust may be payable to First Party's sister, Mrs. William S. Jenks; and

(3) He has recently made an outright conveyance of an undivided one-half interest in his summer home at Lake Beulah, Wisconsin to his four children. First Party estimates a one-half interest in this property was worth approximately \$10,000.00.

The values placed on the properties mentioned in (1), (2) and (3) above are merely estimates made by First Party, and First Party makes no representation that the values so placed thereon by him are the full, fair, cash values of such properties; and

Whereas, the following is a list of the property now owned by First Party:

(1) Residence property on LaLoma Road, Pasadena, California, the value of which is estimated by First Party to be approximately \$15,000.00;

(2) Approximately 333 acres of mountain property near Columbine Lodge, Estes Park, Colorado. First Party estimates that this property is worth approximately \$16,000.00; and

(3) A mining property near Colorado Springs, Colorado known as McDill Placer No. 4120. First Party estimates that this property is worth approximately \$5,000.00; and

(4) Securities and other personal property estimated by First Party to be worth approximately \$10,000.00.

The values placed on the properties mentioned in (1), (2), (3) and (4) above are merely estimates made by First Party, and First Party makes no representation that the values so placed thereon by him are the full, fair, cash values of such properties; and

Whereas, the First Party has fully informed the Second Party of his financial situation, including the amount of his assets, liabilities and net income; and

Whereas, First Party intends to provide by an intervivos trust, will or otherwise for the payment out of the income of the property above referred to as the Michigan Avenue Property of the sum of Fifteen Hundred Dollars (\$1500.00) per year to Second Party for and during the term of her nat-

ural life commencing with the death of First Party, provided Second Party is living with First Party as his wife at the time of his death; and

Whereas, it is the intention of Second Party by this indenture,

(1) To waive, relinquish and bar her dower interest as the wife, or widow, of the First Party in and to all of First Party's lands, messuages, tenements and hereditaments, and to empower and authorize the said First Party, at any time, during the existence of coverture between the parties, or, at his death, his heirs, executors or administrators, to mortgage, or otherwise encumber, and to sell, assign, grant, or convey, any and all of the said lands, messuages, tenements and hereditaments, and to make and execute good and sufficient deeds, or other instruments, therefor, independently, and without the consent, or privity, of the Second Party; and

(2) To waive, relinquish and bar the dower interest of the Second Party as the wife, or widow, of the First Party, in and to all lands, messuages, tenements and hereditaments that he may hereafter become seized of, or that may be owned by him, at the time of, or after, their marriage, and to authorize the mortgaging, encumbering, or conveyance, thereof, in the same manner as the lands, messuages, tenements and hereditaments now seized by him; and

(3) To waive, relinquish and bar, as well, all the homestead rights, or interests of the Second Party and all other rights, statutory or otherwise, of Second Party, as the wife, or widow, of the First

Party, in and to any of the said real property, or interests therein, now owned by the First Party, or that the First Party may be seized of, whether before, or during the period of coverture;

Now, Therefore, This Indenture Witnesseth:

(1) That for and in consideration of the provisions made or to be made for the payment to her out of the income of the property known as the Michigan Avenue Property of the sum of Fifteen Hundred Dollars (\$1500.00) per year for and during the term of her natural life commencing upon the death of First Party, provided Second Party is living with First Party as his wife at the time of his death, and in further consideration of the solemnization of the said proposed marriage between First Party and Second Party, the Second Party hereby waives, relinquishes, bars and surrenders, and hereby agrees to, and does, waive, relinquish, bar and surrender:

(a) All of her right, title and interest, statutory or otherwise, that shall, or may, be hereafter vested in her, because of her said marriage, as the wife, or widow, of the First Party, and consisting of both dower and homestead rights, title and interest, in and to all lands, messuages, tenements and hereditaments now owned by the said First Party, and in and to any and all lands, messuages, tenements and hereditaments that the First Party may hereafter own, acquire, or become seized of;

(b) All homestead rights that shall, or may, vest in her, by virtue of her said marriage with the First

Party, in and to the lands, messuages, tenements and hereditaments that the First Party now has, or that he may hereafter be vested with, or that may hereafter be conveyed to, and vest in, the First Party, during coverture, as aforesaid.

(2) That the Second Party promises and agrees that she will, at the request of the First Party, or of his executors, administrators, or assigns, and at any and all times, as he, or they, may desire, execute, jointly with him, or with them, any and all mortgages, or deeds of conveyance, of any of the real estate, now, or hereafter owned by him, or of which he may hereafter become seized, so that such mortgages, or deeds of conveyance, when executed and recorded, shall show a perfect record title; it being expressly understood and agreed, however, that the First Party, his heirs, executors, administrators, or assigns, may encumber, or convey, any and all of such real estate that he now is, or shall hereafter be seized of, without the Second Party joining with him, or with them, in such deed, or instrument, and that such deed of conveyance, or other instrument, without the signature of the Second Party, shall pass a clear and perfect title to the said land so conveyed, or encumbered, and shall bar her dower and homestead rights to the same extent as though the Second Party had joined with the First Party, or with his executors, administrators, or assigns, in such deed, or deeds, of conveyance, or other instrument.

(3) That in consideration of the promises and undertakings herein made and entered into by the Second Party, the First Party hereby promises and agrees that he will by an inter vivos trust, will or otherwise provide for the payment out of the net income of the property referred to herein as the Michigan Avenue Property of the sum of Fifteen Hundred Dollars (\$1500.00) per year to Second Party for and during the term of her natural life commencing with the death of First Party, provided Second Party is living with First Party as his wife at the time of his death.

(4) That this agreement shall become effective only in the event that the contemplated marriage between the parties hereto shall be solemnized.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

[Seal] EDWIN F. GILLETTE,

[Seal] HARRIETTE MARIE O'NEIL.

State of Illinois,
County of Cook—ss.

I,, a Notary Public in and for the said County, in the State aforesaid Do Hereby Certify that Edwin F. Gillette personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said

instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 19th day of September, A.D. 1938.

.....
Notary Public.

State of Illinois,
County of Cook—ss.

I,, a Notary Public in and for the said County, in the State aforesaid Do Hereby Certify that Harriette Marie O'Neil, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 19th day of September A.D. 1938.

.....
Notary Public.

EXHIBIT 4

Last Will and Testament

In the Name of God, Amen, I, Edwin Fraser Gillette, residing at 691 La Loma Road, Pasadena, of Los Angeles County, State of California, at the age of 75 years, and being of sound and disposing mind and memory and not acting under duress,

menace, fraud, or undue influence of any person whatever, do make, publish and declare this my last Will and Testament in the manner following, that is to say:

First: I direct that my Executor, hereinafter named, pay all my just debts and funeral expenses, as soon after my decease as conveniently may be.

To my beloved wife, Harriette O'Neil Gillette, Secondly: I give, devise and bequeath: All my properties, real, personal and mixed, of whatever kind and wheresoever situate, and more particularly described on Page 2, of this instrument:

The Residence, located at 691 La Loma Road, in Pasadena, Los Angeles County, California, and described as follows:

In Grand Avenue Electric Tract, No. 1 (As per Book 5, Page 125, of Maps, Records of Los Angeles County.) South 14 feet of Lot 13, South 64 feet of Lot 14, all of Lot 27, all of Lot 28. Together with all furnishings, fixtures, paintings and books therein contained. (Tax Valuation, \$9,120.00).

Also a Tract of Land, comprising 336 acres, more or less, in Larimer County, Colorado, and described as follows:

The South Half of the South-West Quarter of Section 22, the North half of the North-West Quarter, the North half of the South-West Quarter, the West half of the North-East Quarter, the West half of South-East Quarter, less 63.7 acres; all in Section 27.

Also a Road, 16 feet wide and One quarter mile

long, in the East half of the South-East Quarter of Section 27. All in Township 4, North, Range 73 West of the Sixth Principal Meridian. Together with the two-story pole and frame Cabin, situate in the North-West Quarter of the South-East quarter of Section 27. (Tax valuation, \$2,500.00, records of Larimer Co., Fort Collins.)

Also the mining property known as the McDill Placer Mining Claim, U. S. Survey No. 4120; and situate in the Pollock Mining District, County of Summit, and State of Colorado, and containing 127 acres, more or less, of mineral land. (Tax valuation, \$23,000.00, records of Summit Co., Breckenridge.)

Lastly, I hereby nominate and appoint my wife, Harriette O'Neil Gillette, the executrix of this my last Will and Testament to serve without any bond being required and hereby revoke all former Wills by me made.

In Witness Whereof, I have hereunto set my hand and seal this twenty-fourth day of April, in the year of our Lord nineteen hundred and thirty-nine.

[Seal] /s/ EDWIN F. GILLETTE.

The foregoing instrument, consisting of three pages including this one was at the date hereof, by the said Edwin Fraser Gillette, signed, and sealed and published as, and declared to us to be his last Will and Testament, in the presence of us, who, at

his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

/s/ FRED M. TAYLOR

Residing at 1669 Casa Grande
Pasadena, Calif.

/s/ CHARLES D. SNYDER

Residing at 514 So. Arroyo Blvd.
Pasadena, Calif.

Filed T.C. U.S., June 10, 1948.

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT
AND OPINION.

Disney, Judge:

This case involves estate tax. Deficiency was determined in the amount of \$40,653.10. The question presented is whether decedent transferred his interest in two pieces of property in contemplation of death within the intent of section 811(c) of the Internal Revenue Code. No issue is taken by the petitioner with the values placed by the Commissioner on the properties. The parties have stipulated that additional expense in the administration of the estate may be determined under Rule 50. A stipulation of facts was filed, is adopted by reference, and the facts therein set forth are found by us. Such parts of the stipulated facts as are re-

garded as pertinent are included, with facts found from evidence adduced, in our

Findings of Fact.

The petitioner's decedent, Edwin F. Gillette, was born on October 19, 1863, and died on December 10, 1943, a resident of Pasadena, California, leaving him surviving his widow, Harriette O'Neil Gillette; two sons, Hyde and Edwin, and two daughters, Helen Gillette and Marietta Will.

The estate was administered in the Superior Court of the State of California in and for the County of Los Angeles. The executrix is decedent's widow.

On September 17, 1938, the decedent and his sister, Mrs. William S. Jenks, each owned, by inheritance from their father, an undivided one-half interest in three real estate properties, as follows: The Hartford Building, on Madison and Dearborn Streets, and the "Michigan Avenue property" on South Michigan Avenue, both in Chicago, Illinois, and the "Lake Beulah property" at Lake Beulah, Wisconsin. On that date decedent conveyed his interest in the Hartford Building to his son Hyde in trust for decedent's four children, conveyed his interest in the Michigan Avenue property to Hyde as trustee, and conveyed his interest in the Lake Beulah property by warranty deed to the four children. Decedent was at the time a widower but was contemplating marriage with Harriette Marie

O'Neil and on September 19, 1938, they entered into an ante-nuptial agreement in writing.

The trust deed covering the Hartford Building provided, in material part, that, in consideration of the trustee's assumption of and agreement to pay, but only from assets of the trust, decedent's indebtedness on promissory notes to his sister Mrs. William S. Jenks in the amount of \$40,000 and \$4,000 accrued unpaid interest, and to pay future interest, the decedent transferred his half interest in the Hartford Building; that trust income should be paid equally to decedent's four children, for life, and, under the will of any child dying, to descendants or spouse of any such child; that the trust should terminate upon the death of the last survivor, of the four children, and Mrs. William S. Jenks, but after death of Mrs. William S. Jenks could be terminated by written instrument signed by a majority of the children; that upon termination of the trust the trust principal, including any accumulated income, should be distributed to the four children, if living, and to the issue of any deceased child, or to his appointee by will, otherwise equally to the survivors among the four children, and per stirpes to issue of any other deceased child; that a majority of the four children or the survivors thereof could by writing alter, modify, or change the trust in any respect, but not, after the death of one, so as materially to affect the rights of those substituted for a deceased child.

The note referred to in the trust instrument as

for \$40,000 and accrued interest was, in fact, for \$41,560. It was a renewal on December 23, 1936, of a note for \$34,000 given by decedent to his sister in 1931. Decedent paid the interest in 1931 and 1932 but never thereafter.

On September 17, 1938, Hyde wrote decedent a letter stating, in material part, that he as trustee assumed and agreed to pay, but only out of the trust assets, the indebtedness to Mrs. Jenks, and would save decedent harmless with reference thereto. Since that time the trustee has paid the interest to Mrs. Jenks from that trust, it being unnecessary to call upon the Michigan Avenue trust for any interest, (under the provisions hereinafter set forth). The record does not disclose whether Mrs. Jenks released the decedent from the indebtedness on the note.

The trust instrument conveying the Michigan Avenue property to Hyde Gillette as trustee provided, in material part, that trust income should be distributed as follows: To the settlor, the decedent, except that Mrs. William S. Jenks should during her life receive \$1,000 a year or such part thereof necessary to pay her \$1,000 a year whenever the trust covering the Hartford Building did not pay her that much interest on the \$40,000 indebtedness; that after settlor's death income should go to assure Mrs. William S. Jenks \$1,000 a year either from the Hartford Building trust or the Michigan Avenue property trust, and if settlor should marry and leave surviving him a widow who was living with

him at his death to pay such widow \$1,500 per year for life; that other income should be paid for life to decedent's four children or to their descendants or spouses as appointed by their wills, or in case of no such appointment, per stirpes to their surviving issue, or, if none, to surviving issue of the decedent; that the trust should terminate on the death of the last survivor of the four children, Mrs. William S. Jenks, and settlor's widow, or by a written instrument signed by a majority of the children; that upon termination of the trust, principal and accumulated income should be distributed equally to the four children if living, but if any were dead to his issue or appointees by will; that the trust could, after death of the settlor, his widow, and Mrs. William S. Jenks, be altered, changed, or modified in any respect by a written instrument signed by a majority of the settlor's living children, but not to affect materially the rights of those substituted for a deceased child; that the trust could be terminated, altered, or modified in any respect at any time by the settlor, in writing.

The ante-nuptial agreement between decedent and Harriette Marie O'Neil provided, so far as material, as follows: That the parties contemplated marriage; that Harriette O'Neil "has been fully informed as to what her statutory rights would be" as wife, or widow; that decedent had recently conveyed his half interest in the Hartford Building in trust for his four children, subject to a mortgage of \$85,000 against the whole property; that after de-

ducting one-half of the \$85,000 it is estimated that the half interest is worth \$175,000; that decedent was indebted to his sister, Mrs. William S. Jenks, on promissory notes totaling \$40,000, with accrued unpaid interest of \$4,000, and that the trustee has assumed that debt, from which it is contemplated the sister will release him, the decedent; that he has recently conveyed his one-half interest in the Michigan Avenue property "in trust for the ultimate benefit of his four children;" that his half interest is estimated to be worth not more than \$100,000; that he is to receive for life the net income, which was \$6,000 under a lease, subject to possible payment of \$1,000 a year to Mrs. William S. Jenks; that he has recently conveyed outright his half interest, estimated to be worth \$10,000, in the Lake Beulah property to his four children; that he owns a residence in Pasadena, California, 333 acres of mountain property, and a mining property in Colorado, and securities and personal property, estimated at \$10,000; that he intends to provide \$1,500 a year, from income of the Michigan Avenue property for his wife for her life after his death; that it is the intent of Harriette O'Neill to waive, relinquish, and bar her dower interest as wife or widow and homestead rights in decedent's property owned or to be owned by him; therefore, that in consideration of the payment to her of the \$1,500 per year for her life after decedent's death, and in consideration of marriage, Harriette O'Neil relinquishes, bars, and surrenders all her rights because of mar-

riage, both dower and homestead, in the property owned or to be owned by the decedent, that she will join him, his heirs, administrators, executors, or assigns in any conveyances thereof, and he, his heirs, executors, administrators, or assigns may convey such properties without her joining.

The decedent was not a man of business. Though well educated, including a course in architecture, he followed neither that profession nor any other for a livelihood. He was interested in studying and composing poetry in French, and in doing beautiful cabinet work in a workshop, interested himself in his fraternities and the publication of one, in a hunt club, a choral society, a tennis and swimming club. He drove a car a great deal and was interested in photography. He devoted all of his time to the above pursuits. Since 1917 he had resided in Pasadena, California. He lived upon the income from property inherited from his father. He and his sister, Mrs. William S. Jenks, had inherited, in equal shares, three pieces of real estate, that is, a summer home at Lake Beulah, Wisconsin, a 14-story office building in the Loop district of Chicago, hereinafter called the Hartford Building, and a property on Michigan Avenue, Chicago, referred to hereinafter as the Michigan Avenue property. The latter was in 1931 subject to a 198-year lease, producing \$12,000 a year; also an option, held by the lessees, to sell to the lessee for \$375,000, \$75,000 of which had been paid. To assure delivery of and good title to the property under the option the

Jenks family and decedent and his then wife had in 1931 given a bond for \$75,000, secured by a trust deed on the property. The lessee-optionee was required either to erect an office building or put up as a guaranty for such erection \$100,000 in securities by March 1, 1939. The Hartford Building was in the hands of building managers, employed by Hyde Gillette, under power of attorney from his father and aunt. It was subject to a mortgage of \$85,000. From December 1933 to September 1938 the building was in a run-down condition and had produced no net income for its owners, except \$310 to each in January 1938 and \$593.78 to each in August 1938. Decedent's half interest was worth about \$120,000. His interest in the Lake Beulah property was worth about \$10,000.

The decedent also owned his home in Pasadena, California, estimated by him to be worth \$15,000, about 333 acres of mountain land in Estes Park, Colorado, estimated by him to have a value of \$16,000, a mining property in Colorado, estimated by him to be worth \$5,000, and securities and other personal property which he estimated at \$10,000. He estimated his interest in the Hartford property was worth about \$175,000 above the mortgage, and that his interest in the Michigan Avenue property was worth about \$100,000.

In 1938 Mrs. William S. Jenks and her husband, Hyde Gillette and Marietta Will lived in or near Chicago. Hyde, now aged 42, was an investment banker in Chicago. Marietta's husband, Howard

Will, now aged 49, had been an attorney in Chicago since about 1924. The Gillette and Jenks families had a close friendly relationship. Mrs. Jenks was very fond of her brother's children. She had no other nieces or nephews. She and decedent were very devoted to each other.

On May 8, 1938, the decedent wrote Hyde, with an identical letter to each of the other children, in effect, that he had been urging one Harriette O'Neil to marry him, but that she hesitated to come into the family, and to give up the freedom which as a bachelor girl she had long enjoyed; that they were lovers "seeking such happiness as may be found at this late date"; that he would welcome any procedure tending to overcome her diffidence in meeting the members of the family; and that he hoped the letter would have favorable consideration. Harriette O'Neil was then 41 years of age; the decedent 75.

The decedent's children, upon learning of the suggested marriage, were pleased at the prospect, except that the record does not indicate the attitude of Helen.

Hyde discussed the proposed marriage with the Jenks family first in May 1938 shortly after he received his father's letter. Mr. Jenks, who largely looked after his wife's interests, took a different view from that of the children, and his wife to a lesser degree. He did most of the talking on the subject, and at times was loud and bitter on the subject. It was discussed by Hyde and the Jenks

family several times, both in Chicago during the summer and at Lake Beulah in August and September. Howard Will joined in the later discussions. The Jenks family was unhappy at the idea. They did not see how decedent could afford to marry, and pointed out that he was receiving only \$6,000 per annum from his interest in the Michigan Avenue property; that he was indebted to Mrs. Jenks on a note, upon which he was not paying the interest; and that they felt that he should not take on additional obligations; also that marriage involved additional expense and that decedent might possibly encumber his sister's interest in the Hartford Building and Michigan Avenue properties; and that if the optionees on the Michigan Avenue property elected to purchase, it might not be possible to give clear title. Jenks pointed out that this might be ruinous for the two families because the Michigan Avenue property represented their only remaining source of income. Jenks at one time said that he would see that decedent was sued for collection of the notes before he incurred further obligations, or he would stop the marriage. Mr. and Mrs. Jenks did not insist that the two trusts contain provisions relative to the distribution of corpus to the children at termination. Their primary interest was to get the note secured. Will never explained to them the complete distribution of the trust corpus. Jenks and his wife, as to the Lake Beulah property, also indicated that having a new head of the family brought to Lake Beulah would

be complication. Decedent had not been paying promptly his share of the expense of that property. It was used by both families, including grandchildren, as a summer home.

Hyde Gillette felt that he would like to do anything he could to prevent a rift in the family, and resolved to try to do something to prevent Jenks expressing his strong feelings about the unpaid note. He approached Jenks, pointed out the feeling that was developing between decedent and his sister, and asked if he could not do something to keep harmony. There had been acrimonious exchange of letters in the past, which had "blown over," and Hyde knew that decedent would become excited and extremely headstrong if Jenks repeated his statement to decedent. Hyde counselled Howard Will and his law firm, and it was felt that the decedent's indebtedness to Mrs. Jenks might be secured by his interest in the Hartford Building. After further discussion it was decided that since Hyde was handling the Hartford Building he might as well be appointed as trustee and the Hartford Building transferred in trust to him. Jenks was adamant on Mrs. Jenks receiving some interest and Hyde decided that he would see that she was guaranteed at least \$1,000 per year out of the approximately \$2,000 interest due her, so he proposed that part of the decedent's \$6,000 income from the Michigan Avenue property assure Mrs. Jenks of the \$1,000; and he felt that a trusteeship in him, over the Michigan Avenue property, was a logical vehicle to assure the payment of

the \$1,000 to Mrs. Jenks, if the Hartford trust was unable to do so. The Michigan Avenue trust was also created to assure delivery of title, in case of exercise of the option, as Jenks suggested that an uncooperative wife of the decedent might hamper the transfer under the option and cause default. Such a trust would also make it more difficult for decedent to encumber his sister's interest.

Howard A. Will prepared the trusts.

Hyde did not desire to engage in correspondence on the subject and wanted to handle it orally with his father. He did not wish to create friction between his father and Jenks. His father was never told about Jenks' statement about suit on the note; but the decedent did know that the Jenks family had objections to the marriage, in connection with the indebtedness on the note. Hyde and Will explained, in general, to Jenks and wife what they contemplated doing.

On June 23, 1938, Miss Harriette O'Neil came through Chicago on the way to visit farther east. She had lunch with Hyde Gillette, whom she then met for the first time, and left that evening for the east. The decedent had previously told her that his family was pleased with the idea of the proposed marriage to her, but that Jenks and wife were not pleased, that his sister was annoyed, and that he was behind on interest but the pressure came when possible marriage came up. He had said nothing to her about a pre-nuptial agreement. She met

Hyde at decedent's suggestion because she wished to meet all his family before the marriage. She spent about an hour and a half with Hyde. He seemed very friendly about the marriage, told her that the Jenks family was not pleased, from a financial point of view, mentioned a large debt, and that the Jenks family felt that his father could not take on extra expense, that the upkeep of the Lake Beulah property was a burden, and that possibly his father and his wife would not be interested in coming to Lake Beulah regularly, and perhaps some arrangement could be made for them to come as guests once in a while. She told him she so preferred, rather than continue the upkeep and joint ownership and use. She was not concerned because she thought probably some arrangement could be worked out to satisfy the Jenks family. Antenuptial agreement was not mentioned. Hyde told her that he and Mr. Will were working on a plan which they thought might take care of the matter and not jeopardize his father's interest. He mentioned the plan in general terms. It had not at that time been completely formulated. It was not until later, after talks with Jenks and his wife, that Hyde and Will arrived at a definite plan. It was entirely completed before the decedent came east, but no documents had been drawn because Hyde wished to discuss the matter with his father and see what he thought of it.

About August 1, 1938, decedent arrived in Chicago. He and Hyde had lunch together that day.

Hyde told him in general terms of Jenks' attitude toward getting some payment on the notes, and then suggested the arrangements that had been decided upon. He did not tell his father what Jenks had said about suit on the note; did not wish to make his father angry. Decedent's reaction to the plan was that if Howard (Will) and Hyde "thought it was all right and it met the problems that had arisen, for us to go ahead and draw the instruments." The matter was discussed practically not at all with the decedent after the instruments were prepared. Hyde gave the instruments to his father to read and explained them in general, not in detail but more in terms of the general principles involved. He told his father that his one purpose was to permit him to continue a happy life and to get married with the friendly feeling of all the family, which could be accomplished by some arrangement definitely to take care of the interest on the note. Decedent left the matter entirely in the hands of Hyde and Howard. Hyde tried to make it perfectly clear to his father what the documents meant and covered, but had no special conference with him. Hyde originated the idea of transferring the Lake Beulah property, and the idea of providing \$1,500 per year for the new wife, in order to make the arrangement acceptable to his father. There was no discussion of a will. It was Hyde's purpose to keep the Jenks family and his father apart and they never discussed the matter in Hyde's presence. Hyde knew what he wished to accomplish.

He does not remember ever showing the documents to Jenks or his wife. He told her in a general way what they contained. Jenks did not suggest any method of getting interest paid on the note. Hyde took it upon himself to find a way. He showed his father and Mrs. Jenks that the Hartford property was gradually improving and he thought that some day the earnings would also improve. Though the trust on the Michigan Avenue property was revocable, Hyde did not then feel that his father would revoke it, thinking his father was not sufficiently interested in business details to take the trouble to make that step.

Howard Will was never asked by the decedent to prepare the transfers. During July and August 1938 Hyde and he discussed the matter. Will devoted several days to drafting the instruments. One of the senior members of his firm, who collaborated with him, was familiar with Federal tax matters. That member of the firm suggested the pre-nuptial agreement. Will discussed the plan with Hyde from as early as June 1938.

On September 17, 1938, the decedent signed the trust agreements. Will went over them with decedent, "high spotted the documents, the important provisions" and discussed them "rather thoroughly" with him. Will gave decedent the ante-nuptial agreement, suggesting that he take it with him and discuss it with Miss O'Neil, and it was arranged for her to come in on Monday the 19th to sign or discuss it. She was at Kenilworth, Illinois, and

decedent went there to spend the week-end, the 17th and 18th of September. He did not discuss the ante-nuptial agreement with her but told her that Hyde and Will were writing up some papers to that effect. She came in on Monday, September 19th, to Hyde's office. She, decedent, Hyde and Will were present. She then met Will for the first time. He suggested that she should have a lawyer to look over the papers, but she felt it to be unnecessary. She read the ante-nuptial agreement, which mentioned the trust agreements, and they were explained to her "more or less" before she signed. She realized, when she read the agreement, that the transfers had previously been made.

Decedent and Harriette O'Neil were married October 29, 1938, and lived together until his death. On April 24, 1939, the decedent executed his will, giving, devising, and bequeathing all of his property to his wife. His children were not mentioned in the will. He did not discuss it with his wife and she did not at the time know that he had executed it.

Decedent was not seriously ill at any time prior to his last illness, except for colds, and was not attended by a physician until the day he died, when his wife, against his will, called a doctor. He had for two or three weeks complained of not feeling exactly as usual. He stayed in bed two days before his death. The physician, about ten o'clock in the morning, told her decedent's kidneys were not functioning correctly, and for him to keep warm and

stay in bed. He died about two o'clock that day. The certificate of death states coronary thrombosis due to kidney infection as cause of death.

The lessees of the Michigan Avenue property exercised their option thereon in the spring of 1939 and paid for the property \$300,000, one-half of which went to Mrs. Jenks, who requested Hyde to invest it in securities for her. She still owns them.

The decedent, on September 3, 1940, amended the trust of the Michigan Avenue property to provide a minimum income to him of \$6,000 per year (if necessary, to be paid from principal) except any payment necessary to Mrs. William S. Jenks.

In December 1940 Mrs. Jenks created a trust, drawn largely by Will. Therein she transferred her half interest in the Hartford property to Hyde Gillette in trust to pay the income to her four nieces and nephews, or their issue, for life, the corpus to go to them on termination.

The petitioner filed the decedent's estate tax return on or about March 3, 1945, with the collector at Chicago, showing a total estate tax payable of \$45,064.39, which was paid as follows:

9-27-44	\$12,158.49
3-10-45	32,905.90

The return did not include as a part of the decedent's gross estate the ownership of any interest in the two tracts of real estate described above, respectively, as the Hartford Building and the Lake Beulah, Wisconsin, property. In his notice of de-

ficiency herein the respondent has included in the value of the petitioner's gross estate the value of the two tracts of real estate under section 811(c) of the Internal Revenue Code.

OPINION

Did the Commissioner err, under the facts found above, in including the Beulah Lake and Hartford Building properties in decedent's gross estate? No question is raised as to the values used by him. The question is solely one as to whether the transfers were in contemplation of death. Moreover, the respondent does not argue that the decedent was in poor physical or mental condition at the date of transfer. In fact, the decedent appears to have been in good condition until very shortly before his death more than five years later at the age of 80 years.

It is not necessary to cite cases to support the statement that the question is one of fact on all of the evidence, or that the petitioner, the Commissioner having determined that the transfers were made in contemplation of death, has the burden of proof to demonstrate the contrary.

Upon careful examination of the facts which we have found in detail, we have come to the conclusion that the petitioner has not met the burden imposed. We find the evidence to be in a peculiar condition. Though the crux of the matter is as to what the decedent contemplated, the record is almost, if not quite, barren as to what he actually had in mind. A

great deal of evidence appears as to what his son and son-in-law intended in drawing the instruments which the decedent signed; also to show the intention of Jenks, and to a lesser degree of his wife. But remarkably little gives any real view of the state of mind of the decedent, as to what he did or did not contemplate, in making the transfers involved. What little does appear does not, in our opinion, by any means suffice to overcome the presumption of correctness of the Commissioner's determination.

It does not appear necessary to discuss at great length the facts involved and above detailed. The petitioner's position amounts to this: That Jenks, for himself and his wife, opposed the marriage because of her financial interest, in securing protection on the note, resulting in the transfer of the Hartford Building property; and because of decedent's failure to pay expense of the Lake Beulah property, and desire that a new wife not intrude therein, resulting in the transfer of the Lake Beulah summer home. Yet the Hartford Building property was, as to decedent's interest, estimated by him as worth about \$175,000, and no issue is taken on the Commissioner's figure of \$120,621.32, whereas the indebtedness on decedent's note was about \$45,000 including interest, while the record indicates nothing as to what decedent owed on upkeep of the Lake Beulah property, valued as to his one-half at \$10,000. Yet we find both properties transferred, not merely as security for the

amounts owed by the decedent, but absolutely, and to his children directly as to the Lake Beulah property, and, as to the Hartford property, to them as beneficiaries of a trust, which was to save decedent from the \$45,000 indebtedness—though, in fact, the record fails to show any release of decedent upon such indebtedness by Mrs. Jenks, the holder. It is, of course, at once obvious that a conveyance of the property by way of security, by mortgage or deed of trust, conditioned upon payment of the indebtedness on the decedent's note without the further transfer of the corpus to the children as beneficiaries, would have given Mrs. Jenks just the same protection as she received from the conveyance of the Hartford Building; and it is equally obvious that the outright deed of the Lake Beulah property was unnecessary to protection of the petitioner's share of expense thereon, so far as finance is concerned. Why then did the decedent make the further and financially unnecessary conveyances to the children? The element of lack of financial necessity therefor destroys, in our view, the argument that the dominant motive in the transfers was the satisfaction of Jenks and wife. It simply is not reasonable to say that it was necessary to transfer to the children, as well as secure Mrs. Jenks. Nothing in the record indicates that she, or her husband for her, required conveyances of the breadth actually made. On the contrary, Will, when asked "was it Mr. and Mrs. Jenks' thought at all, did they insist that the provisions go in, the two trusts rela-

tive to the distribution of corpus to the children at termination of such trust?" answered "No, they did not," and later said that their primary interest in the Hartford trust was to get the note secured. He, the attorney in the matter, did not recall that he "ever explained to them the complete distribution of the corpus of those trusts." As to the provisions in the Hartford trust that on termination corpus would go to the children Hyde testified: "The attorneys thought of that provision." Of course, that the Jenks family was not interested in conveyance to the children does not dispose of the non-financial interest the Jenks family had in the Lake Beulah summer home and a new wife not intruding therein, but that is clearly a very minor factor in this problem, affecting only that piece of property and insufficient to explain transfer of outright title thereto. Will testified with respect to that property: "* * * the feeling there on Mr. Jenks' part was not perhaps as strong as it was as to the business properties," though he, Jenks, did say decedent did not always pay his share. The Jenks' attitude does not explain outright conveyance of the Lake Beulah property to the children.

The above has not considered the conveyance of the Michigan Avenue property (not directly involved, because admittedly the property is within gross estate). But it we find of little weight or importance on this question, for two reasons: First, it was of very little money interest to the Jenks family, who are argued to be the prime movers

here, since it could only produce, for the satisfaction of the note to Mrs. Jenks, whatever part of \$1,000 a year the Hartford Building did not produce. (In fact, the Hartford Building produced the \$1,000 per year, and had, during 1938, produced, prior to the transfers, \$903.75 in cash for Mrs. Jenks, though for several earlier years it had produced after payment of expenses, taxes, and mortgage interest, no net income.) Second, though the Michigan Avenue property was covered by a mortgage-secured bond for \$75,000 to assure delivery of title under an option, upon which bond Mrs. Jenks was liable, nevertheless the trust set up covering that property was wholly modifiable and revocable, was in fact later modified by the decedent. Therefore, such a trust gave Mrs. Jenks no real or substantial assurance of protection on the bond. Again, moreover, conveyance of the corpus of the trust to decedent's children upon termination of the trust is seen to be unnecessary to protection of Mrs. Jenks and, therefore, her protection does not appear as the real or dominant reason for the transfer to the children. That the parties hoped the decedent would not revoke the trust is a frail reed upon which to support the idea that the transfer would protect Mrs. Jenks. Its frailty is demonstrated by the fact that he modified the trust in 1940. By complete revocation Mrs. Jenks would have been left as she was before the transfer in trust. Considering the relative unimportance of the provisions for protection of Mrs. Jenks, compared

with the values transferred to the children, the fact that they were the natural objects of decedent's bounty, and were unprovided for in his will later made in October 1939, together with the fact that the record does not disclose the decedent's intentions as to his children, we find it impossible to conclude that the dominant motive of decedent in this matter was the wish to placate the Jenks family and marry with harmony in the family. The children, or all but one, were, on the record, satisfied in any event that he marry.

Not only is there dearth of evidence to support the petitioner's theory, but there is no small indication to the contrary, that is, that there was contemplation of death. The test is not consciousness of imminent death. "It is contemplation of death, not necessarily of imminent death, to which the statute refers." *United States v. Wells*, 283 U.S. 102; *Iglehart v. Commissioner*, 77 Fed. (2d) 704. Therefore, the fact that decedent was in good mental and physical condition for about five years after the transfers does not control. But in considering these transfers on September 17, 1938, we may not reasonably disregard the contents of the ante-nuptial agreement of September 19th, drawn in connection with the transfers and presented to him on the same date. The evidence is that on September 17th decedent was given the ante-nuptial agreement to take to Miss O'Neil over the week-end, that it recited the transfers as well as what property he had remaining, that therein he agreed to provide

by inter vivos trust, will or otherwise, from the income from the Michigan Avenue property, \$1,500 a year for the life of his wife commencing with his death if she is living at the time of his death and she, repeatedly referred to as his "wife, or widow" waived dower and homestead rights in his property and authorizes him during life or, at his death, his heirs to encumber or convey such property. To fail to see in such language, in such close connection with the transfers, indication of contemplation of death in the transfers, though not necessarily imminent demise, would be blindness to reality and to disregard an integral part of the whole plan. In our view, the protection of Mrs. Jenks on the note is given too much importance by the petitioner. We are not convinced that it is shown to be the dominant motive of the decedent. Without further discussion, we conclude and hold that the petitioner has failed to show that the transfers of the Hartford and Lake Beulah properties were not, as determined by the Commissioner, in contemplation of death within the meaning of section 811(c) of the Internal Revenue Code.

Because of stipulation as to deductions of additional administration expense,

Decision will be entered under Rule 50.

Enter:

Entered Jan. 25, 1949.

Seal

Received T.C.U.S. Jan. 13, 1949.

Served Jan. 25, 1949.

[Title of Tax Court and Cause.]

ORDER

Because of inadvertent error in stating the caption of this cause as it appeared in the petition, and prior to the order amending same on October 20, 1947, it is

Ordered: That the Memorandum Findings of Fact and Opinion entered January 25, 1949, be amended, as to the caption thereof only, to read as follows:

ESTATE OF EDWIN F. GILLETE, HAR-
RIETTE O'NEIL GILLETTE, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

[Seal] /s/ R. L. DISNEY,
Judge.

Dated: Washington, D.C. January 25, 1949.

Served Jan. 26, 1949.

[Title of Tax Court and Cause.]

ORDER

It appearing from the record in this cause that although the deficiency notice issued from the office of Internal Revenue service in Chicago, Illinois,

the estate tax return was filed with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, and that, therefore, the recitation in the Memorandum Findings of Fact and Opinion entered herein on January 25, 1949, is in that respect inadvertently erroneous, it is

Ordered: That the Memorandum Findings of Fact and Opinion herein be and the same is hereby corrected and modified to recite on page 14 (of the mimeographed copy) "Collector for the Sixth District of California at Los Angeles, California" instead of "collector at Chicago."

[Seal] /s/ R. L. DISNEY,
Judge.

Dated: February 10, 1949 Washington, D.C.

Served Feb. 11, 1949.

[Title of Tax Court and Cause.]

RESPONDENT'S COMPUTATION FOR
ENTRY OF DECISION

The attached proposed computation is submitted on behalf of respondent, to The Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Court, without prejudice to the respondent's right to contest the correctness of the decision herein by the Court, pursuant to the statutes in such cases made and provided.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

JOHN D. KILEY,
Division Counsel.
HAROLD H. HART,
Special Attorney, Bureau of
Internal Revenue.

STATEMENT

C-TS:CD

AP:JOA

In re: Estate of Edwin F. Gillette
Mrs. Harriette O'Neil Gillette,
Executrix
233 South San Marino Avenue
Pasadena, California

Docket No. 15623

Date of Death: December 10, 1943

Estate Tax Liability

Tax Liability	Tax Assessed	Deficiency
\$82,997.50	\$45,064.39	\$37,933.11

The adjustments shown in the attached schedules have been made in accordance with the memorandum opinion of The Tax Court entered January 25, 1949, Stipulation of Facts and Staff Memorandum dated March 31, 1949, for decision under Rule 50.

Estate of Edwin F. Gillette Date of Death: December 10, 1943

Schedule 1

Net Estate

Net estate as shown in the deficiency

notice dated June 20, 1947.....	\$283,645.32	\$323,645.32
Net estate adjusted.....	275,145.34	315,145.34
Adjustment	\$ 8,499.98	\$ 8,499.98

Deductions:

(a) Attorneys' fees\$8,250.00

(b) Miscellaneous expenses.. 249.98

Total adjustment\$ 8,499.98

Schedule 2

Explanation of Adjustments

(a) An additional deduction for attorneys' fees has been allowed as follows:

Attorneys' Fees (Tax Court Trial).....	\$ 5,750.00
Attorneys' Fees (For appeal of case).....	2,500.00
Total	\$ 8,250.00

(b) An additional deduction for miscellaneous administration expenses has been allowed in the amount of \$249.98.

Schedule 3
Computation of Tax

Net estate for basic tax, Schedule 1.....	\$275,145.34
Net estate for additional tax, Schedule 1.....	315,145.34
Basic Tax:	
Tax on \$250,000.00.....	\$ 6,500.00
Tax on \$25,145.34 at 4%.....	1,005.81
	<hr/>
Gross basic tax.....	\$ 7,505.81
Less: Credit for State inheritance tax paid	2,863.15
	<hr/>
Gross basic tax less credit for State inheritance tax.....	\$ 4,642.66
Less: Credit for gift tax as shown in deficiency notice	685.86
	<hr/>
Net basic tax.....	\$ 3,956.80
Additional Tax:	
Tax on \$250,000.00.....	\$65,700.00
Tax on \$65,145.34 at 32%.....	20,846.51
	<hr/>
Gross basic and additional taxes.....	\$86,546.51
Less: Gross basic tax.....	7,505.81
	<hr/>
Gross additional tax.....	\$79,040.70
Less: Gift tax credit.....	none
	<hr/>
Net additional tax.....	\$ 79,040.70
	<hr/>
Total Tax	\$ 82,997.50
Tax assessed: April 1945, page 100, line 5.....	45,064.39
	<hr/>
Deficiency	\$ 37,933.11

Received and Filed T.C.U.S. April 6, 1949.

[Title of Tax Court and Cause.]

NOTICE UNDER RULE 50

Take Notice that the Respondent in the above-entitled proceeding filed with the Court on April 6, 1949 a computation and notice, a copy of which is inclosed. This proceeding will be called for hearing upon such computation at 9:30 a.m. on April 27, 1949 before a Division of the Court at its Washington Office, Constitution Avenue at 12th Street, Northwest, unless, prior to that date, your written acquiescence to the entry of a decision based on such computation shall have been filed with the Court.

No further notice of said hearing will be sent.

VICTOR S. MERSCH,
Clerk.

To: E. H. McDermott, Esq.
111 West Monroe St.
Chicago 3, Ill.

[Title of Tax Court and Cause.]

The computation of the respondent filed with the Court on April 6, 1949 has been examined and found to be in accordance with the determination of the Court as set forth in its report. Petitioner therefore joins with the respondent in praying that the Court enter its decision based upon such computation, reserving however the right to contest the correctness of such decision in the appellate courts as provided by statute.

/s/ DANIEL A. TAYLOR,
135 South LaSalle Street,
Chicago 3, Illinois.

Received and filed T.C.U.S. Apr. 26, 1949.

The Tax Court of the United States
Washington

Docket No. 15623

ESTATE OF EDWIN F. GILLETTE, HAR-
RIETTE O'NEIL GILLETE, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Memorandum Findings of Fact and Opinion of this Court, entered on January 25, 1949, the respondent, on April 6, 1949, filed computation for entry of decision, to which petitioner filed acquiescence on April 26, 1949. Accordingly, it is

Ordered and Decided: That there is a deficiency in estate tax in the amount of \$37,933.11.

[Seal] /s/ R. L. DISNEY,
Judge.

Entered Apr. 27, 1949.

Served Apr. 28, 1949.

In the United States Court of Appeals
For the Ninth Circuit

The Tax Court of the United States
Docket No. 15623

ESTATE OF EDWIN F. GILLETTE, HAR-
RIETTE O'NEIL GILLETTE, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

Harriette O'Neil Gillette, Executrix of the Estate of Edwin F. Gillette, petitioner herein, by E. H. McDermott, Wm. M. Emery, and J. S. Pennell, her attorneys, hereby petitions for a review of the decision of the Tax Court of the United States entered in the above entitled proceeding on April 27, 1949, and respectfully shows:

I.

Nature of Controversy

The controversy involves the correct estate tax liability of the Estate of Edwin F. Gillette, deceased, who died on December 10, 1943, survived by his widow, the petitioner, and four children. On or about September 17, 1938, shortly prior to his marriage to petitioner on October 29, 1938, the decedent conveyed to or for the benefit of his four

children, who had been born of a prior marriage, his interest in an office building property in Chicago known as the Hartford Building and in a summer residence known as the Lake Beulah property. Respondent asserted and the Tax Court held that these transfers were made in contemplation of death and so were includible in the taxable gross estate. Petitioner contends that these properties were transferred to insure family harmony, to make possible his intended marriage, and to accomplish other purposes associated with life, that the transfers were not made in contemplation of death, and are not taxable.

The Tax Court determined an estate tax deficiency in the amount of \$37,933.11. Petitioner contends that there was no deficiency in estate tax, but that there was instead an overpayment thereof of at least \$1,275.76.

II.

Jurisdiction and Venue

Petitioner seeks a review by the United States Court of Appeals for the Ninth Circuit of the decision and the findings of fact and conclusions of law of the Tax Court of the United States, by virtue of the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The final decision of the Tax Court of the United States was entered on April 27, 1949. Petitioner is an individual residing at 233 South San Marino Avenue, Pasadena, California, and is the duly qual-

ified and acting executrix of the Estate of Edwin F. Gillette, whose residence at the time of his death was at Pasadena, California.

The estate tax return for said Estate, in respect of which the aforementioned tax liability arose, was duly filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, whose office is located at Los Angeles, Los Angeles County, California, within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, and the tax shown on said return was paid to said Collector.

Wherefor the petitioner prays that the decision of the Tax Court of the United States and its findings of fact and conclusions of law be reviewed and corrected by the United States Court of Appeals for the Ninth Circuit.

/s/ E. H. McDERMOTT

/s/ WM. M. EMERY

/s/ J. S. PENNELL

Attorneys for Petitioner.

Filed T.C.U.S. July 22, 1949.

In the United States Court of Appeals
For the Ninth Circuit

The Tax Court of the United States
Docket No. 15623

ESTATE OF EDWIN F. GILLETTE, HAR-
RIETTE O'NEIL GILLETTE, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NOTICE OF FILING PETITION
FOR REVIEW

To:

Charles Oliphant, Esq.
Chief Counsel
Bureau of Internal Revenue
Washington, D.C.

Dear Sir:

You are hereby notified that the above-named petitioner did on the 18th day of July, 1949, duly mail for filing with the Clerk of the Tax Court of the United States at Washington, D.C. a Petition for Review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above entitled cause.

A copy of the Petition for Review is hereby served upon you.

Dated this 19th day of July, 1949.

/s/ J. S. PENNELL

Attorney for Petitioner.

Affidavit of Mailing

State of Illinois,

County of Cook—ss.

John S. Pennell, being first duly sworn under oath, says that he is one of the attorneys of record for the petitioner in the above entitled cause, that he did, on the 19th day of July, 1949, give to the Commissioner of Internal Revenue, respondent herein, notice of the filing of Petitioner's Petition for Review by placing a true copy of said Petition for Review together with a true copy of the foregoing Notice of Filing Petition for Review as filed herein in an envelope addressed to Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D.C., placing thereon sufficient United States postage stamps and by placing said stamped, addressed envelope in the United States mails by putting it in the United States mail box located in the Harris Trust Building, 111 West Monroe Street, Chicago, Illinois.

/s/ JOHN S. PENNELL

Subscribed and sworn to before me this 19th day of July, 1949.

[Seal] /s/ GERTRUDE LUDWIG,

Notary Public.

Filed T.C.U.S. July 22, 1949.

The Tax Court of the United States
Washington

Docket No. 15623

ESTATE OF EDWIN F. GILLETTE, HAR-
RIETTE O'NEIL GILLETTE, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER ENLARGING TIME

Upon motion of counsel for petitioner, it is
Ordered that the time for preparation, trans-
mission and delivery of the record sur petition for
review of the above-entitled proceeding in the
United States Court of Appeals for the Ninth
Circuit is extended to October 20, 1949.

/s/ ERNEST H. VAN FOSSAN,
Acting Presiding Judge.

m b w

Dated: Washington, D.C. August 22, 1949.

Served Aug. 24, 1949.

In the United States Court of Appeals
for the Ninth Circuit

The Tax Court of the United States,
Docket No. 15623

ESTATE OF EDWIN F. GILLETTE, HAR-
RIETTE O'NEIL GILLETTE, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS TO BE
RELIED UPON

Harriette O'Neil Gillette, Executrix of the Estate of Edwin F. Gillette, by her attorneys, E. H. McDermott, Wm. M. Emery, and J. S. Pennell, hereby states that she intends to rely upon the following points in this proceeding:

That the Tax Court of the United States erred:

1. In holding and deciding that transfers of his interest in property known as the Hartford Building in Chicago, Illinois, and the Lake Beulah property at Lake Beulah, Wisconsin, made by decedent on September 17, 1938, were made in contemplation of death.

2. In failing to hold and decide that said transfers of property made by decedent on September 17, 1938, were not made in contemplation of death

but were motivated by other considerations associated with continued life.

3. In disregarding substantial and uncontroverted evidence that decedent did not contemplate death in 1938 and that the transfers of property made by him in that year were prompted solely by financial considerations and the desire to be married with the approval of his entire family and by other considerations associated with continued life and not death.

4. In holding and deciding that petitioner failed to overcome the presumption of correctness attaching to the Commissioner's determination.

5. In failing to hold and decide that the presumption of correctness attaching to the Commissioner's determination disappeared upon the introduction of evidence tending to prove that the transfers were not in contemplation of death.

6. In that its decision is contrary to law, is clearly erroneous, and is not supported by substantial evidence.

7. In ordering and deciding that there is a deficiency in estate tax of \$37,933.11.

8. In failing to order and decide that there was an overpayment of estate tax of at least \$1,275.76.

/s/ JOHN S. PENNELL,

Attorney for Petitioner.

Service of a copy of the within Statement of

Points to Be Relied Upon is hereby acknowledged this 31st day of August, 1949.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue.

Received and Filed T.C.U.S., Sept. 16, 1949.

[Title of Court of Appeals and Cause.]

NARRATIVE STATEMENT OF EVIDENCE

This cause came on for hearing at Chicago, Illinois, before the Honorable R. L. Disney, Judge of The Tax Court of the United States, on June 10, 1948. Daniel A. Taylor, Esq., appeared for petitioner, and Harold H. Hart, Esq., appeared for respondent.

After opening statements of counsel, in the course of which counsel for both parties stated that the only issue for decision was one of contemplation of death, the following proceedings occurred, all witnesses having been duly sworn prior to giving testimony:

A written stipulation of certain facts together with four exhibits attached thereto were received in evidence.

Evidence for Petitioner

MRS. DELPHINE JENKS

subpoenaed by respondent, testified as a witness for petitioner as follows:

Direct Examination

By Mr. Taylor:

My name is Delphine May Gillette Jenks. I am 81 years old and I live at 10 East Schiller Street, Chicago, Illinois. I am the widow of William Shipley Jenks, who died in either 1941 or 1943, I don't remember. My brother, Edwin F. Gillette, died in 1943, I guess, my husband in 1941. I guess that was it.

I do not remember the date or year when my brother got married. I think I objected to his marriage for business reasons, for financial reasons only. He had some debts owing to me and didn't pay the interest on the debts very regularly. He was of artistic temperament, not very much of a business man, and we thought he could hardly afford to get married under the circumstances.

I talked to my husband about my brother's marriage, but I do not recall talking to my nephew, Hyde Gillette, about it. My husband always handled my business and financial affairs. I couldn't say whether he talked to Hyde Gillette about my brother's marriage but I suppose he would have been more apt to do so.

I had forgotten that Edwin F. Gillette had trans-

(Testimony of Mrs. Delphine Jenks.)

ferred his interest in the Lake Beulah summer home but I believe he had. When I learned of my brother's contemplated marriage I had no feeling about a new wife occupying the summer home. [2*]

Cross-Examination

By Mr. Hart:

I don't know how much the note was that was outstanding in 1938 when my brother Edwin was about to be married. I don't know when that note was first issued. I think some interest payments were made.

I remember I had a half interest with my brother in a business building in the loop, the Hartford Building, Madison Street. There was another building, our family residence, 306 Michigan Avenue. Later a taxpayer was built, no big building.

I transferred something in the Hartford Building to Hyde Gillette, trustee, I guess. I don't know. I don't remember when or how. I did not transfer the property on Michigan Avenue, that stayed the way it was. I have not transferred the Lake Beulah property; I still hold that, half of it. I transferred some Hartford, that was transferred to Hyde Gillette, trustee, I suppose.

Hyde Gillette handles my business affairs now. I don't know when he started that. I don't know dates at all. It was after my husband died, I think. Hyde Gillette—Glore, Forgan & Co., prepares my income tax returns, I suppose.

*Folios appearing at foot of Original Narrative Statement of Evidence.

MRS. MARIETTA GILLETTE WILL

a witness for petitioner, testified as follows:

Direct Examination

By Mr. Taylor:

I am 36 years of age, a daughter of Edwin F. Gillette, and the wife of Howard A. Will, whom I married in 1937. I live [3] in Winnetka, Illinois, and have lived in and about Chicago since my marriage. Prior to that time I lived with my father, my sister Helen and my brother Edwin in Pasadena, California. My brother Hyde left the home in Pasadena in about 1925. We had lived in Pasadena since 1917. My mother died in 1932 and thereafter our family in Pasadena consisted of my father, my sister Helen, my brother Edwin and myself. Hyde was either living in Chicago or away at school. Helen lived with us in Pasadena until 1935.

Prior to my mother's death she handled the finances of our family as far back as I can remember. After her death I handled the greater part of them. My father's chief source of income was from two leases in Chicago. These leases were on a Michigan Avenue property and property under the present Hartford Building.

I never knew how much my father's income was prior to 1930. My father never discussed his financial affairs with me. He didn't take much interest in business affairs. As long as the checks kept com-

(Testimony of Mrs. Marietta Gillette Will.)

ing in he never worried about where they came from or what was behind it.

My father was never engaged in any business as far back as I can remember. He belonged to numerous organizations and clubs. He was interested in drawing. He composed poetry in French and English. I believe he wrote a play. He had a work shop. He did beautiful cabinet work. He belonged to the Cauldron Club and the Cauldron Singers which was a branch of it. He was a member of the Athletic Club in Pasadena. He [4] designed covers for his fraternity magazine. He had his own car. He drove it a great deal. Whenever a group of people were going anywhere, it was usually he that took them. A very expert driver. He continued in these activities up until the time of my marriage. Generally speaking, he devoted his whole day to them.

Petitioner's Exhibit 5, admitted in evidence, is a design made by my father.

After my marriage and removal to Chicago in 1937 I saw my father once or twice every year. When I saw him he continued his interest in the activities I have outlined. When we visited in Pasadena we would stay a week or two, and his days were always very much the same as they were when I lived there permanently. I saw him in Chicago after I was married. I saw him at Lake Beulah in 1938, 1939 and 1940. He was very active on these occasions. He used to go swimming every day. He was interested in boating but didn't do a great deal of it at that time.

(Testimony of Mrs. Marietta Gillette Will.)

To my knowledge my father never had a serious illness prior to his last illness. If he had had a serious illness I would undoubtedly have known about it. I don't ever remember a physician making a professional call on him. I do know that he went down to a physician's office once in a while for a minor ailment or for a checkup. He had a very pleasant disposition. He was very much interested in what everyone did around him and what his children did. That disposition continued up throughout the last time I saw him. I first learned of the [5] illness which caused his death on the day he died.

In May, 1938, I learned of my father's contemplated remarriage. We received a letter from him about it. I was very pleased about it. I had met Miss O'Neil in Pasadena. I had no objections at all to his remarriage, and wrote to him to indicate my attitude. I talked to him about it that summer at Lake Beulah and again told him how pleased I was. He was at Lake Beulah the whole month of August that summer and in Chicago in the early part of September. Prior to the time I saw my father in 1938 I discussed his contemplated remarriage with my husband.

I did not discuss it with Mr. and Mrs. Jenks, but I was present and heard what they had to say about it. They seemed very much opposed to it. They said he couldn't afford to get married. I did not at that time discuss with Hyde or my husband the transfer into trust of any of my father's property.

(Testimony of Mrs. Marietta Gillette Will.)

I knew some transfers were being discussed that summer. I knew that transfers were eventually made. I was not familiar with the details.

Cross-Examination

By Mr. Hart:

My brother Edwin is two and one-half years older and my sister Helen is a year older than I am. In 1935 Edwin, Helen and I were living in Pasadena. I first met Mrs. Harriette O'Neil Gillette in 1931 at a large party given by my aunt, Mrs. Jenks. Mrs. Jenks knew her before that. I believe they belonged to the same French group. I don't remember seeing her [6] again until a great many years afterwards. I was pleased when I heard that my father contemplated marrying her. She had made a nice impression on me at the time I met her.

The Lake Beulah property is about 18 miles northeast of Lake Geneva, about thirty miles southwest of Milwaukee. It has five and a half to six acres, mostly wildland, with a house, a barn and a little boathouse. My father and his family and Mr. and Mrs. Jenks would occupy it jointly during the summer. My relationship with Mr. and Mrs. Jenks was always very close. She was fond of all her brother's children. That relationship continued past 1938 and is still continuing today.

Prior to my father's remarriage I was present when Mr. and Mrs. Jenks made remarks opposing this remarriage. This was not at a family confer-

(Testimony of Mrs. Marietta Gillette Will.)

ence. Sharing the same house at Lake Beulah different members of the family are naturally in the living room at the same time. I heard the same remarks at their Schiller Street apartment in Chicago. They would bring up the subject and tell me they didn't see how he could possibly marry, that he didn't have enough money, something about a debt they owed him. I didn't take that in very thoroughly at that time. I didn't know the amount of the debt or the circumstances.

Redirect Examination

By Mr. Taylor:

When I mentioned "debt they owed him" I meant a debt he owed them.

At the time I received the letter from my father in [7] 1938 announcing his intention to remarry he was living with my brother Edwin. My sister Helen was living in Chicago.

Recross-Examination

By Mr. Hart:

I was married in 1937. I had known my husband, Mr. Will, for three months prior to our marriage.

MRS. ANNA J. WYNNE.

a witness for petitioner, testified as follows:

Direct Examination

By Mr. Taylor:

I am a widow, 59 years old. I am employed by

(Testimony of Mrs. Anna J. Wynne.)

the Globe Coal Company, 322 South Michigan, doing general office work.

I was in the office with Edwin F. Gillette for many years. This was the office of the estate of Edwin L. Gillette. That office was occupied by Edwin F. Gillette, his brother-in-law William S. Jenks, and an attorney, George B. Holmes. I did stenographic work and a little bookkeeping in connection with the Fernwood property that was being sold on payments and I had the record of that. That was the Gillette estate. The Gillette estate's other affairs was the collection of rents and leaseholds. At that time that was from the ground under the Hartford Building. They latter had another one.

I was employed in that office about 14 or 15 years. I am not positive in which year I went there, it was in 1906 or 1907. I know I was there in 1907. I think I left there in 1920. Mr. Gillette was still associated with the office when I left but he wasn't present. He was living in California. I [8] think he moved to California about 1917. Before Mr. Gillette left, Mr. William S. Jenks really had the most to do with the estate it seemed. When there were any papers to be signed in connection with the estate, of course Mr. Gillette did that, but Mr. Jenks seemed to take the lead in the business end of it.

When I first went there Mr. Gillette was working in an architect's office. The architect was Howard Van Dorn Shaw. Mr. Gillette was with Mr. Shaw for about two years after I came there. He spent

(Testimony of Mrs. Anna J. Wynne.)

part time over there and part time in his own office. I understand that he had the position with Mr. Shaw just for experience. In general he was doing drafting and detail work in that office. After he left Mr. Shaw he continued the architect business for himself associated with Mark Levings. I don't think that lasted more than about two or three years. I was in the office from which that business was conducted. It wouldn't be very easy to say how much time Mr. Gillette devoted to the architect business because he had other little interests that would creep in, too. He was interested in fraternal matters, fraternities and clubs and things like that took a lot of time. There were a couple of clubs at Lake Beulah that he had some connection with, as officer. I don't remember his title — Secretary-Treasurer. They had a yacht club where they had other titles, Commodore or something, and he had something to do with the collection of dues and sending out notices for their different affairs. The yacht club would have their sailing races, and then there [9] was a country club up there, Lake Beulah Country Club. He spent quite a lot of time with their affairs in the summertime when they would have their tennis tournaments and their golf tournaments and things like that.

While I was there Mr. Gillette was editor for a while of the fraternity publication of Tau Beta Pi. We did a good deal of the work ourselves in the office for that magazine and he designed the cover

(Testimony of Mrs. Anna J. Wynne.)

for it and he wrote words and music for their song. He would get in touch with the different fraternity members to get articles for the magazine. It was an engineering honorary fraternity.

He was active in another fraternity, Theta Xi. They would have luncheons once a week and he was very much interested in calling up the different ones to attend the luncheon on the regular day.

The only building that I recall that he served as architect for was an 18 apartment building at 67th and Paxton on the South Side. Then there was an alteration job on North State Street, remodeling interior and exterior. Then, of course, he designed his own house at Lake Beulah. They moved the old house over on the lake front for a boathouse and he designed a new one.

I wouldn't say that he made anything out of the architectural business. I know he had to dig into his own funds for running the office.

At first the rental checks from the Hartford Building came to the estate of Edwin L. Gillette. Later that was [10] changed so that Edwin F. Gillette received one check and Delphine Gillette Jenke the other, each for half of the rental payment. Later on the check for Edwin F. Gillette, instead of being made to him, was made to his wife, Mabel Hyde Gillette.

These checks were turned over to his wife to handle because he had become indebted and needed some assistance to clear his debts and he needed the

(Testimony of Mrs. Anna J. Wynne.)

signature of his wife on some papers. She refused to sign anything without consulting the Jenks. Then when the Jenks came in on it they wouldn't sign anything to clear him until he would agree to have his wife take care of the finances. I know about this because Mrs. Gillette came into the office. I don't know what it was that was to be signed; but she just wouldn't sign it and then she told me later that she was sorry that she didn't know that he was getting himself into debt. She said, "If you ever know of anything again would you please tell me about it"?

I heard Mr. Jenks say that he did not like the architectural business that Mr. Gillette was engaged in. It was just like throwing money away and I know he did not approve of it. It was something Mr. Jenks did not think Mr. Gillette could afford to do. It was sort of more like a hobby for him and it was a rather expensive one.

There was a Mr. Dodson who came into the office. I don't know just what he was but I would say he was a promoter and he got Mr. Gillette interested in something that he signed some notes. There were notes that would become due at the bank and Mr. Gillette wasn't able to take care of them. Of [11] course, the bank was pressing for them and I went over to Mr. Dodson's office one day and told him about it and he said, "Well, don't you worry about it. I will get you some cash." Mr. Gillette was away so I went to his office and he gave me I think it was \$1,000 which I carried across the street to the bank

(Testimony of Mrs. Anna J. Wynne.)

to pay something on a note. Mr. Jenks did not know about this transaction until Mrs. Gillette was brought in and she talked to him about it. That is the occasion which brought to a head this transferring of Edwin F. Gillette's funds to Mabel Hyde Gillette. Mr. Jenks would remark sometimes to me that Mr. Gillette wasn't handling things just right.

Cross-Examination

By Mr. Hart:

I started to work for the Edwin L. Gillette estate in 1906. Edwin L. Gillette was the father of Edwin F. and Mrs. Jenks. I was there about 14 or 15 years, I think. I left about 1920, I would say. Everything I have related here deals with the period prior to 1920.

I don't really know how old Mr. Jenks was. I don't remember whether he was older or younger than Mr. Gillette. I know there was a difference in age there but I don't really recall. I would think though that he was probably a little older. I didn't know at that time how old Mr. Gillette was.

Mr. Jenks wasn't really in any business, just looking after his wife's interest in the estate. He looked after the collection of rents on the Hartford Building ground and a piece of property on Michigan Avenue. I don't know whether the [12] Michigan Avenue property was under lease. That wasn't under lease when I first went there. That lease was made after I came there. I don't remember what

(Testimony of Mrs. Anna J. Wynne.)

year. They made a 198-year lease on the ground. The Hartford Building lease was made long before my time. That was about 1892. There wasn't much business in collecting those rents. Mr. Jenks came down to the office every day and stayed for two or three hours. He took care of some correspondence.

The income from the Hartford Building lease was \$27,000 a year. When the Michigan Avenue building was first leased, I think the income from it was \$10,000 and then a few years later it was raised to \$12,000. That rent would be split two ways, between the Jenks family and the Gillette family.

Mr. Jenks at one time was Treasurer, I think, of the Fairbanks Company a few years back.

Redirect Examination

By Mr. Taylor:

Fernwood is a subdivision, a part of Chicago, on the South Side. They had lots and houses which were being sold on installment. That was part of the Gillette estate. George B. Holmes, an attorney in the office, had charge of that at first when I first came there.

Recross-Examination

By Mr. Hart:

This Mr. Holmes is now dead. I don't know when he died, 4, 5, 6 years ago. Something like that.

MRS. HARRIETTE O'NEIL GILLETTE

petitioner, testified as follows: [13]

Direct Examination

By Mr. Taylor:

I am the widow of the late Edwin F. Gillette and executrix of his estate. Mr. Gillette and I were married in Yuma, Arizona, October 29, 1938. I continued to live with him as husband and wife until his death. Prior to my marriage I was employed as a French teacher.

I had known Mr. Gillette since 1931. During the period of two or three years before the marriage I saw him at least four times a week. We were both members of two French societies. One was the Alliance Fraincaise which is all over the United States and the other was a small French group, a group of members who were interested in French. The small group was called the Demi-Cercle. Mr. Gillette was a very interested student of French. He had been interested ever since his childhood. He often read a lecture in French to this larger group, the Alliance Francaise, that he had written himself, and he translated plays and poetry of all kinds and composed words for songs in French. He translated one whole book of poems, the Rubaiyat of Omar Khayyam into French and studied French all the time. He also spoke German and Italian.

He was also active in a men's glee club called the Cauldron Club which was a group of civic-minded men, and he belonged to two fraternities, Theta Xi,

(Testimony of Mrs. Harriette O'Neil Gillette.)

and Tau Beta Pi which was an honorary. After we were married he devoted much time to the fraternity work. He continued for some time to design the covers weekly for the Theta Xi and he had always attended the Tau Beta Pi, the group meeting when they initiated the new [14] members for the society. He wrote the ritual they used for that. During the time I was married to him I should say he devoted half of his time to those activities. We also motored a great deal. We motored all over Southern California and used to motor in one day up to San Francisco which is 450 miles. He did all the driving. If we went on picnics with our French group it was always Mr. Gillette who took half the group.

He owned some land near Estes Park in Colorado. There was a great many acres. I don't know how large but there was a house, a mountain cabin, a two-story house. that he was always interested in fixing when it needed fixing. He built all the trails or a great many of the trails around the house and sawed large limbs and things. That was at an altitude of 9,000 feet. He did that subsequent to our marriage. In 1939 I wasn't with him. In 1940 we were there for some time and he did that.

He continued his activities in the French groups and singing groups up until the time of his last illness. About a week or ten days before he died he sang a two-hour concert standing with his glee club and he had driven into Los Angeles to a Theta Xi luncheon within that week or ten days.

(Testimony of Mrs. Harriette O'Neil Gillette.)

Mr. Gillette had a very happy disposition and he enjoyed fun and books and he was exceedingly interested in people. He was a very kind person.

During the period I was married to him he had no illnesses except one or two colds prior to his final illness. He [15] was never attended professionally by a physician prior to his last illness. Though he didn't want me to I called a doctor the morning he died. For two or three weeks prior to the date of his death he had complained of not feeling exactly as usual. He stayed in bed two days before his death feeling not just himself. He was first attended by the physician on the date of his death. At that time the physician told me that his kidneys weren't functioning correctly and for him to keep warm and stay in bed. That was all the physician told me. That was about 10 o'clock in the morning and he died about 2 that day.

(Petitioner's Exhibit 6, certified copy of death certificate, was received in evidence.)

Interjection by Mr. Hart

Mr. Hart: I might say at this time to Your Honor that a lot of the testimony that has been put in—the Government doesn't make much point of the health situation in this case. Mr. Gillette, as far as we know, considering his age at the time this transfer was made, was healthy according to that age.

The Court: You mean that you are satisfied that no further evidence need be put on as to his condition of health?

(Testimony of Mrs. Harriette O'Neil Gillette.)

Mr. Hart: That is right.

The Court: I am not pressing you to do that, you understand, but you have made an indication, and if that is what you mean, we don't need to take any further [16] time on it. It is up to you, of course.

Mr. Hart: Well, I will take that responsibility.

The witness continued as follows:

Mr. Gillette at the time of his death was 81 years and two months.

Prior to the marriage I had met Edwin and Helen and Marietta and Hyde. I had also met Mr. and Mrs. Jenks. I first met them in Pasadena. The first time I met Hyde Gillette was at the University Club in Chicago on June 23, 1938. I was in Chicago at that time just long enough for luncheon and to take the train that evening for the East. I next returned to Chicago in early September on my way back to California and stopped to visit some friends in Kenilworth, Illinois.

Prior to the time I came to Chicago in June 1938, Mr. Gillette and I discussed the subject of the attitude of the members of his family to the marriage. He told me that his own children were pleased with the idea but that Mr. and Mrs. Jenks were not pleased. I was not concerned about that. I didn't know there was any reason to be concerned. Mr. Gillette indicated that the reason Mr. and Mrs. Jenks had some objections to the marriage was that he owed them quite a large sum of money,

(Testimony of Mrs. Harriette O'Neil Gillette.)

a debt contracted, but no mention was made of the sum or how the debt was contracted or anything of that kind.

Prior to the time I came East I did not know the source or extent of Mr. Gillette's income. I knew he owned his home in Pasadena and I heard him speak of Lake Beulah, because [17] he had gone there nearly every summer. Nothing had been said to me by him prior to the time I came to Chicago in June 1938 about a prenuptial agreement. Mr. Gillette suggested that I meet Hyde on my way East because I was anxious to have met all of his family before we decided, before we married. The time I met Hyde I spent just luncheon with him, maybe an hour and a half. He said that he was pleased that the marriage was to take place. He seemed very friendly about it. He told me that Mr. and Mrs. Jenks weren't pleased about the idea of the marriage from a financial point of view. He mentioned the debt or a large debt and said that the Jenks felt that his father couldn't take on any extra expenses. He said that possibly his father and I wouldn't be interested in coming to Lake Beulah as regularly and that the upkeep of the place was quite a burden and that some arrangement could be arrived at that we could just go up as guests once in a while. I told him that I would prefer to have it that way rather than continue the upkeep, continue to have joint ownership and have two families run one establishment.

(Testimony of Mrs. Harriette O'Neil Gillette.)

I wasn't concerned about the attitude of Mr. and Mrs. Jenks because I thought that possibly some arrangement could be worked out whereby they would be satisfied. It seemed better for someone to try to find a way of taking the objection, from a financial point of view, out of the picture. I had no desire to interfere in any way with any financial arrangement Mr. Gillette had with the Jenks.

The subject of an antenuptial agreement was not mentioned at that first meeting with Hyde Gillette. The subject was first mentioned to me by Mr. Gillette when he came to Kenilworth, Illinois to spend a week-end when I was visiting there. That was the 17th and 18th of September, 1938. I did not discuss the subject of an antenuptial agreement with him on that occasion. He told me that Hyde and Mr. Will were writing up some papers to that effect. We didn't discuss the agreement at all. The antenuptial agreement was signed by me and Mr. Gillette in Hyde's office. Mr. Gillette, Hyde and Mr. Will were present. I had no objections whatever to signing it. At that time Mr. Will suggested that I ought to have a lawyer to look over the papers in my interest. I didn't obtain one because I didn't feel that it was necessary. The papers which I signed and which, of course, I read and which were explained to me before I signed them mentioned that the Hartford Building and the Michigan Avenue property had been transferred to Hyde Gillette as trustee. I did not discuss any

(Testimony of Mrs. Harriette O'Neil Gillette.)

of these transfers with Mr. Gillette prior to the week-end he showed me the proposed antenuptial agreement. When I read the papers at the office I realized that Mr. Gillette's one-half interest in the Hartford Building and the Michigan Avenue property had been transferred to Hyde Gillette in trust and that his one-half interest in the Lake Beulah summer home had been transferred to the Gillette children.

Cross-Examination

By Mr. Hart:

I first met Mr. Will that day in Hyde's office in September, 1938. I first met my husband in 1931. From that time I always saw him at our French meeting which was every Friday afternoon during eight months of every year. He proposed marriage to me on April 6, 1938. We did not discuss business matters then. He and I never discussed business matters. He never definitely discussed the debt due Mrs. Jenks. But just before I came East he seemed upset one day and when I asked him what it was he said his sister was annoyed at the idea of his marriage when he wrote the family that he was hoping to get married. That was either in late May or very early June 1938 before I left to come East. At that time I believe he told me that the debt was one of long standing. I believe he said that he was behind on interest and that the pressure for payment came when the possibility of marriage came up.

(Testimony of Mrs. Harriette O'Neil Gillette.)

He didn't discuss the making of a will with me. I don't know who drew the will. The other day I believe I was told that he drew it himself. Of my own knowledge I didn't know that he had made a will. He didn't discuss it with me at all.

Mr. Gillette was devoted to his children. He was very fond of them. They were an exceptionally close family. I never heard of any friction between any of the children and Mr. Gillette. A long time before, several years before our marriage, I saw Mr. Jenks and Mr. Gillette together in Pasadena. I never heard them quarrel but I saw very little of them together, at a dinner party or something of that kind. Mr. [20] Gillette and Mrs. Jenks were a very devoted brother and sister. He had no other brothers or sisters living.

I did not have an attorney represent me when these antenuptial contracts were being signed. I don't believe you marry a man if you haven't confidence that he is doing things the right way and his son too. I read the antenuptial agreement before I signed it. They explained to me what property was transferred to Mr. Hyde Gillette as trustee and what the terms of the two trusts were so I could understand the reason the transfers were being made. I understood that when my husband died I was to get \$1,500 a year for life from the Michigan Avenue property. That was explained to me. I don't remember whether it was my suggestion or the suggestion of someone else that that sum be in-

(Testimony of Mrs. Harriette O'Neil Gillette.)
cluded in the trust respecting the Michigan Avenue property.

Prior to a few days before Mr. Gillette's death he wasn't seriously ill at any time.

HYDE GILLETTE

a witness for the petitioner, testified as follows:

Direct Examination

By Mr. Taylor:

I am 42 years old. I am the son and the oldest child of the deceased, Edwin F. Gillette. My brother Edwin is 39, three years younger than I. My sister Helen is 38. I live in Barrington, Illinois. I lived in Chicago from the time I was born until my family went to Pasadena in 1917. I lived in [21] Pasadena from 1917 until 1922 when I started going East to school. I returned to Chicago to make it my permanent residence when I finished school in 1930 and have lived in and around Chicago since that time except when I was in the Navy. I graduated from Princeton in 1928 and from the Harvard School of Business Administration in 1930. I am presently engaged in the investment banking business and have been in that business since the fall of 1930. In the firm in which I work I am manager of the public utility buying department. I have supervisory responsibility over the research department, which has its own manager, and I have supervisory responsibility over the investment advisory department, which also has its own manager.

(Testimony of Hyde Gillette.)

I recall nothing whatsoever of my father's business activities before he moved to California in 1917 except one visit I made to his office when I was a little boy in which he showed me his drawing boards. He was not engaged in any business after he moved to California. He established his home there in 1917. My father graduated from Rensselaer Polytechnic Institute at Troy, New York in 1885 and 20 years later graduated from Armour Institute with an engineering degree and started the practice of the profession of architecture in 1906. After my father moved to California during the period I lived with my family prior to going East to school, my father had a great many interests based primarily on the talents which he had. One was his talent for design and [22] in employing and enjoying that talent he spent a great many hours at his desk drawing cover designs for his fraternity magazine. Another talent which he had that gave him pleasure in his retirement was one for languages. He read German and he spoke it fluently and he read a great deal of French. He wrote French poetry for his own amusement and translated English verses into French. His interest in photography perhaps arose from two trips he took around the world earlier in his life on which he had taken several volumes of pictures. He was active in the Cauldron Club and its affiliate, the Cauldron Singers, and he had a membership in the Valley Hunt Club, a tennis and swimming club

(Testimony of Hyde Gillette.)

which he joined for his children's sake. He spent a great amount of time in his workshop because he was very skilled with tools and from time to time made pieces of cabinet work. He enjoyed motoring and walking. He wrote quite a few letters in connection with his fraternity affairs in which he was a very prominent member.

The Court: Mr. Taylor, I don't want to inhibit you in the slightest degree in making your case but it has become apparent some time ago that this gentleman was of a somewhat artistic nature rather than a business man; that he didn't tend to business very much; that he had an income. Now he certainly has made that impression on my mind long ago, in the absence of countervailing evidence. In the absence of evidence to contradict that, there is [23] no use in accumulating evidence along that line.

Mr. Hart: The evidence shows that this man had a large income up until 1933 and that it wasn't necessary for him to have a bread and butter job and he didn't have one.

The Court: I think the facts concerning the kind of existence he lived are already established.

Mr. Taylor: I am satisfied to let that subject drop at this point in view of that situation.

The witness continued as follows:

As far back as I can remember my mother handled the finances of our family. I remember that she was the one who signed checks that were sent to me at school beginning in 1922.

I am the Hyde Gillette named as trustee in the

(Testimony of Hyde Gillette.)

transfers of one-half interest from my father of the Hartford Building trust and the Michigan Avenue property in trust. I am still acting as trustee under those instruments. My father and Mrs. Jenks acquired their respective one-half interests in those properties by inheritance from their father in 1892.

Petitioner's Exhibit 7, the lease of the Michigan Avenue property, was admitted in evidence.

Petitioner's Exhibit 8, a photostatic copy of the lease on the Hartford Building, was admitted in evidence.

The witness resumed as follows:

The Hartford Building is located on two pieces of property one of which is owned one-half by Mr. Gillette and [24] the other half by Mrs. Jenks and the other piece of property by the Northern Trust Company as trustee for the Elizabeth A. Ware Estate. It is a fourteen-story office building of old construction located in the loop. The 99-year lease made in 1892 was not in effect at the time my father transferred his undivided one-half interest in that property to me. It had been cancelled as a result of forfeiture in 1933. The ground rent paid to my father and my aunt on the Hartford property was defaulted as of February 1, 1933 and the lease was declared forfeited. It was necessary to take the matter to the Municipal Court to obtain possession and possession was obtained on December 1, 1933. I handled the matter and consulted with Wilson & McIlvaine. After possession had been regained of

(Testimony of Hyde Gillette.)

the building I obtained a firm of building managers to operate it. I also negotiated an operating agreement with the Northern Trust Company so that the building could be operated amicably. It was also necessary to negotiate a mortgage for \$85,000 to pay off taxes which had accrued for some years through nonpayment by the lessee of those taxes. The building managers placed a manager in the building to negotiate leases, to make expenditures for upkeep and operation and to collect rents from the tenants. They rendered monthly reports to the Gillette family whom I represented. I took over the management of the Hartford Building under powers of attorney from my aunt, Mrs. Jenks, and from my father.

The following documents were identified by the witness and admitted in evidence: [25]

Petitioner's Exhibit 9 is the power of attorney from my father to which I just referred.

Petitioner's Exhibit 10 is the power of attorney which I received from Mrs. Jenks. It also runs to William S. Jenks, her husband, as well as to me.

The witness resumed as follows:

After I received the power of attorney Mr. Jenks consulted with me quite frequently at my office in regard to the management of the building. Mrs. Jenks didn't consult with me at all as she was leaving her her affairs in Mr. Jenks' hands to be handled by him and my father left the matter entirely in my hands.

The net receipts from the building after oper-

(Testimony of Hyde Gillette.)

ating expenses and charges for taxes were distributed by the building manager upon the order of the owners for the purpose of paying interest on the mortgage and attorneys' fees and the balance was retained by them as a small reserve for emergency rehabilitation of a very run-down property. From December 1, 1933 until the transfer of the Hartford Building by my father to me as trustee all checks were made out by the building manager to the estate of Edwin L. Gillette, which was merely the family banking account and which paid the interest on the mortgage and the attorneys' fees. In 1938 two checks were made payable to Mrs. Jenks and Mr. Gillette personally. The first one in January gave them each \$310 and one in August gave them each \$593, which was the only money either of them received from the Hartford Building for their personal use. [26]

Petitioner's Exhibit 11 was identified and received in evidence, the witness testified in relation thereto as follows: This exhibit dated June 2, 1948 was prepared by me from the monthly records furnished me by the building manager. It is simply a record of the distributions made by them from December 1, 1933 through the end of 1938 showing the date of each distribution and the purpose for which it was made.

The Michigan Avenue property is a piece of land with approximately a 60 feet frontage, 200 feet deep, in the 100 block on Michigan Avenue. It had

(Testimony of Hyde Gillette.)

a small two-story building on it erected by the lessees. It was owned one-half by my aunt Mrs. Jenks and one-half by my father, and was under a 198-year lease made in 1909 expiring 2007 for a term of \$12,000 a year. I first knew something about this property when I took over the management of the Hartford Building for my father and my aunt in 1933 but I became intimately acquainted with the affairs in connection with this property in the spring of 1939. At that time the Michigan Avenue property lease contained a provision that an office building should be erected on the premises by the lessee within 20 years after the lease was made, which would be in 1929. In 1928 the lessees obtained an extension of 10 years of the period during which they would have to erect an office building or until 1939. If they did not erect a building by March 1, 1939 they would have to put in escrow \$100,000 in securities. In 1931 the lessees approached my uncle, Mr. Jenks, and negotiated an agreement to purchase the property. [27]

The witness identified the following documents which were duly received in evidence, and further testified as follows:

Petitioner's Exhibit 12. This document dated January 26, 1931 is an extension agreement between my family and the Lehmann family who are the lessees of the Michigan Avenue property, extending the date when a building had to be erected under the lease until 1939 or in lieu thereof putting up \$100,000.

(Testimony of Hyde Gillette.)

Petitioner's Exhibit 13 is the option to purchase dated January 26, 1931 between my family, the owners of the Michigan Avenue property, and the Lehmann family, the then lessees. I recognize the signatures of my father, mother, aunt and uncle.

Petitioner's Exhibit 14. This document dated January 26, 1931 is a bond given by my family to the lessees of the Michigan Avenue property that they will make delivery and give good title to the Michigan Avenue property under the option to purchase if the lessees desire to exercise the option. I recognize the signatures of my father and my aunt.

Petitioner's Exhibit 15: This document also dated January 26, 1931 is the trust deed securing the bond, which has been introduced in evidence as Petitioner's Exhibit 14, made by my family to the lessees of the Michigan Avenue property, and it is signed by my father and my aunt whose signatures I recognize. [28]

On March 1, 1939 the lessees of the Michigan Avenue property advised us that they desired to exercise their option and the transactions incident to the exercise were completed within a couple of months. That involved the payment of \$150,000 to Mrs. Jenks and \$150,000 to Hyde Gillette, trustee. I participated very actively in carrying out Mrs. Jenks' and Mr. Gillette's end of that transaction, consulting with Wilson & McIlvaine, attorneys who handled the legal details. At the time my father transferred his one-half interest in the Michigan Avenue property to me in trust I had no knowledge

(Testimony of Hyde Gillette.)

that this option to purchase would be exercised.

During the 1930s my father's chief sources of income were from these two leases. Prior to 1930, from 1920 to 1930, his chief source of income was also from the two leases.

The indebtedness which I as trustee assumed under the trust instrument conveying to me my father's one-half interest in Hartford Building was a note that my father had given my aunt in the amount of \$41,650 and accrued interest on that in the amount of approximately \$4,000. This document which you hand me is the note for \$41,650, the indebtedness of which I assumed as trustee of that trust. This indebtedness was the renewal of a note dated in 1931 for \$34,000 given by my father to my aunt plus interest accrued to December 23, 1936, the date of the note for \$41,650. The second document for \$34,000 dated June 23, 1931 is the note signed by my father to my aunt as just stated. It is the origin of the \$41,650 note. [29]

This third document which you hand me I became familiar with for the first time when I assumed the indebtedness of my father to my aunt, as trustee under the Hartford trust. The signatures on it are the signatures of my father, Edwin F. Gillette, and my mother, Habel Hyde Gillette.

Petitioner's Exhibit 16, the note for \$41,650 dated December 23, 1936, was admitted in evidence.

Petitioner's Exhibit 17, the note for \$34,000 dated June 23, 1931, was admitted in evidence.



\$34,000⁰⁰ =

June 23,

1921-

On Demand after date we promise to pay to
the order of Delphine Gillette Jenks —
Thirty-Four Thousand \$ — Dollars

at

Value received with interest at 5 per cent per annum, ^{simple}

Due

Erwin F. Gillette

Walter Hyde Gillette

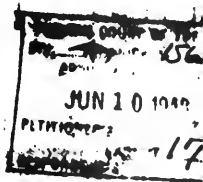
Dec. 23, 1936

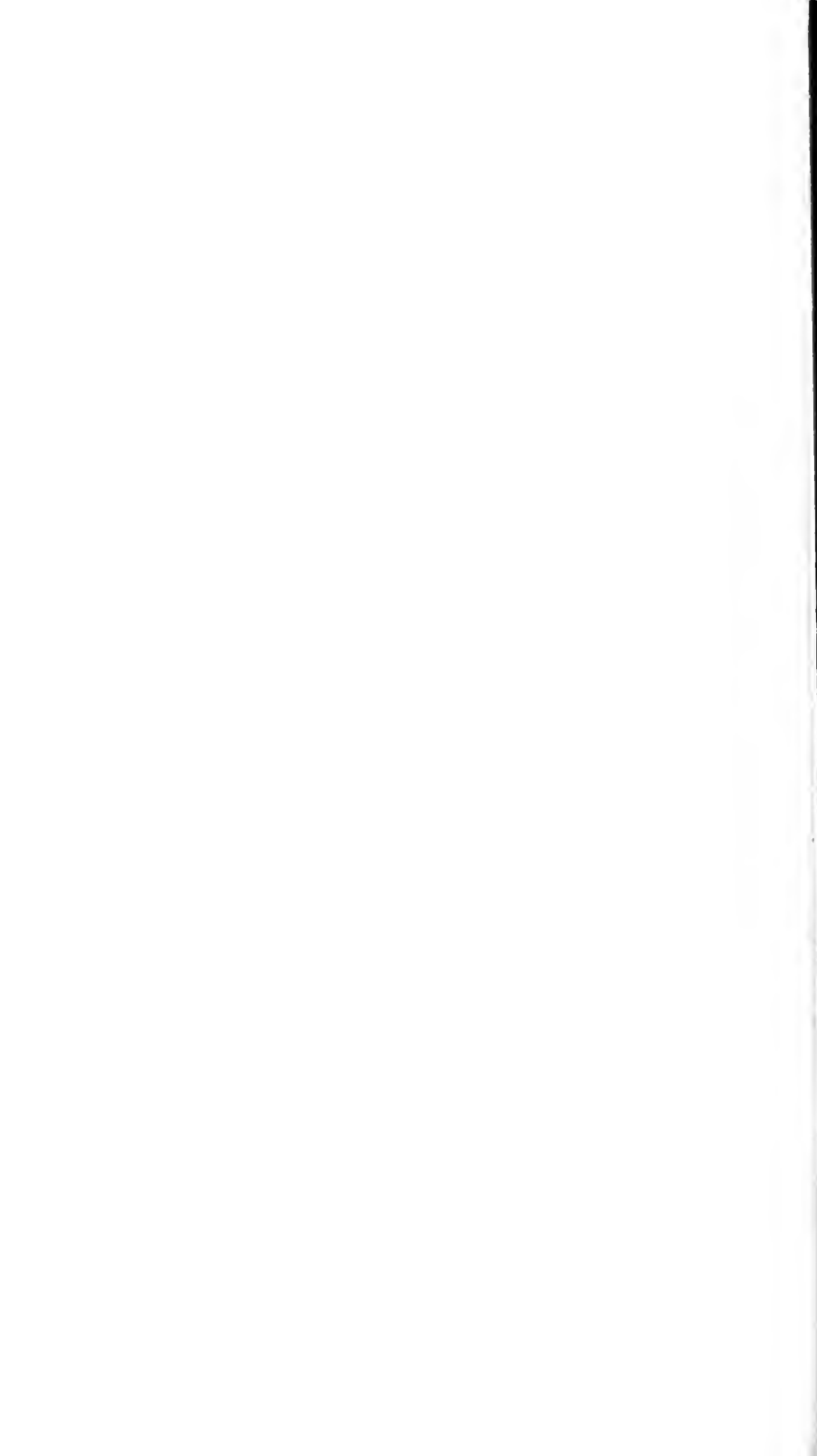
Received new note

41,650. to cover

amount due to date

Delphine Gillette Jenks.





\$41,650⁰⁰ Chicago, Ill. December 23, 1936.

On Demand — after date I promise to pay to
the order of Delphine Gillette Jenks —
Forty One Thousand Six Hundred Fifty ⁰⁰/₁₀₀ Dollars
at

Value received with interest at the rate of 5 ^{per cent - annually} per cent per annum

Edmund J. Gillette



No. — Due —

100 100

RECORDED
12
PETITIONERS
JUN 1 1940
DIVISION OF THE U.S.
COURT OF THE U.S.

(Testimony of Hyde Gillette.)

Petitioner's Exhibit 18, a document dated June 5, 1921 signed by Edwin F. Gillette and Mabel Hyde Gillette, was admitted in evidence.

PETITIONER'S EXHIBIT NO. 18

Edwin F. Gillette
691 La Loma Road
Pasadena, California

June 5, 1921.

In consideration of my sister, Delphine Gillette Jenks, joining me in making a mortgage on the S.W. corner of Dearborn and Madison Streets, owned jointly by us, for \$70,000.00 for five years @ 5 $\frac{3}{4}$ %, I hereby declare that the proceeds of said mortgage being entirely for my personal use, I will reimburse the said Delphine G. Jenks, should she, at any time, be obliged to use any of her funds to pay either the principal of said mortgage or the interest thereon.

/s/ EDWIN F. GILLETTE.

/s/ MABEL HYDE GILLETTE.

The above agreement is hereby extended to cover renewal of said loan for five (5) years @ 5% from June 23, 1926, the conditions being unchanged.

/s/ EDWIN F. GILLETTE.

/s/ MABEL HYDE GILLETTE.

The notation on the back of Petitioner's Exhibit 17, the note for \$34,000, are interest payments made through June 23, 1932. There is also the statement that a new note for \$41,650 was received on December 23, 1936. The notations are signed by Delphine

(Testimony of Hyde Gillette.)

G. Jenks whose signature I recognize. The notations were on the document when it came into my possession. They show interest payments 7/23/1931 and June 23, 1932 of about \$850 each which is interest, I believe, at 5% on \$34,000 on a semi-annual basis. The notations are in the handwriting of my uncle and the signature is that of my aunt.

At the time my father transferred to me one-half interest in the Hartford Building in trust there was no mortgage on the building other than the \$85,000 mortgage which I negotiated. [30]

PETITIONER'S EXHIBIT 19

September 17, 1938.

Mr. Edwin F. Gillette,
Lake Benlah, Wisconsin.

Dear Mr. Gillette:

You have just conveyed to the undersigned as Trustee your undivided one-half interest in certain real estate at the Southwest Corner of Madison and Dearborn Streets, Chicago, Illinois, known as the Hartford Building, and in the trust indenture the undersigned as Trustee has assumed and agreed to pay, but only out of the assets of the trust estate, your indebtedness to your sister, Mrs. William S. Jenks. In further evidence of such assumption, the undersigned as Trustee under said indenture hereby agrees to indemnify and save you harmless from any loss resulting from any action which may be brought by Mrs. William S. Jenks or her heirs, executors, administrators or assigns to collect from you per-

(Testimony of Hyde Gillette.)

sonally the said indebtedness which the undersigned as Trustee has assumed as aforesaid or any interest thereon.

Yours very truly,
/s/ HYDE GILLETTE,

Not individually but only as Trustee under the Trust Indenture above referred to.

Filed T. C. U. S. June 10, 1948.

Petitioner's Exhibit 19 was admitted in evidence and the witness testified in respect thereof as follows. This is a letter addressed to Edwin F. Gillette dated September 17, 1938 and signed by me as trustee, stating that I would save my father harmless from any loss resulting from any action that might be brought by Mrs. Jenks or her heirs under the indebtedness which I had assumed and which he previously owed her. That is the indebtedness mentioned in the trust instrument. The language of the Hartford Building trust, Exhibit 1, refers to an indebtedness assumed by the trustee of \$40,000 whereas the note, Petitioner's Exhibit 16, is in the amount of \$41,650. The language in the trust was used because the note was in Mrs. Jenks' safety deposit box and she was at her country home at Lake Beulah when the indenture was drawn and said she would give us the exact figure as soon as she returned to Chicago.

(Testimony of Hyde Gillette.)

PETITIONER'S EXHIBIT 20

Edwin Fraser Gillette
691 La Loma Road
Pasadena, California

Mother's Day,
May 8, 1938.

Dear Hyde:

Aunt Delphine may have surmised, from my last letter, that an unusual event might occur, but this will, no doubt come to you as a most unexpected surprise to the effect that Harriette O'Neil and I are deeply in love with each other, but though having repeatedly urged her to marry me, she hesitates in our becoming engaged, from a very natural sensitiveness in coming into our long established family where there might be the slightest suggestion of being considered an interloper whose presence would not be entirely welcome to everyone.

Also, having lived as a bachelor girl, for so many years, she hesitates in giving up that freedom and independence which she has so long enjoyed, and which may be readily understood. I fear that it may require a great amount of persuasion to induce her to change her mind, in spite of our mutual fondness. Nor is she in favor of even so short a visit as a couple of days at "Narasaki", upon her return from eastern visits, about the end of September, to be "looked over", as she so aptly terms it. I suggested that such might also be an opportunity for her to do some "looking over" herself, but her only

(Testimony of Hyde Gillette.)

definite assurance was that she desired more time for a calmer consideration of the subject, and that she would give me her answer in the fall, which period I shall await as patiently as possible. I feel, in my inmost heart, that I cannot be truly happy again, alone.

In view of the conditions, I should devoutly welcome any proceEDURE which might tend to overcome her diffidence in meeting the assembled members of our family when so fine an opportunity offers. Perhaps a reassuring letter from each might bring a solution.

We are merely two lovers who are seeking such happiness as may be found, at this late day, but who seem to be held back by certain conventions, as well as by the uncertainty of her welcome. Could she but find out what a really nice family is ours, after all, she might be induced to throw in her lot with us, eventually.

Harriette's birthday which we shall celebrate on the 18th of this month, when she will reach forty-one, shows an unfortunate disparity between our ages, but our spirits seem to be equally young in our ideals and future outlook, a similar background of education, an identical interest in languages, art, music, drama and literature, she being a much greater reader than I. As a matter of possible importance to some, we may each boast of equally ancient and honorable lineage, hers dating back to Kings of Ireland, than which no ancestry is much older. Her stepfather is a teacher of and lecturer

(Testimony of Hyde Gillette.)

on music, and her mother was formerly a singer in concert and opera. Curiously enough, she has the names of both of my darling little grand-daughters: Harriette and Marie.

Ted came over Saturday noon, to obtain a copy of his Birth-Certificate, in order to apply for passport, as he has been invited to go to Paris with Mr. Sturges, on a seven-weeks trip, to start as soon as Paramount will let him go, in order to write a script over there. I took the occasion to let Ted know of my hopes and ambitions, in regard to Harriette, and he showed great delight and enthusiasm, wishing me all sorts of luck and happiness, saying that I was "getting young again." So at least one member of our little family is happily "on our side." It now remains to be seen as to how all the others will take it, and I shall anxiously await their verdict. I shall not let Harriette know of my having written this letter until "the returns are all in", to obtain which I am sending an identical letter to all of your children, for your mature and individual study.

Harriette has been teaching since she was eighteen, bravely and independently, through many vicissitudes and discouragements, as did your dearest Mother, having had a solid foundation for her chosen profession through a fine education abroad, in French, in which she particularly excelled, as well as in German, Italian and Music. She has a fine sense of proportion, and fully appreciates the value of money, a useful acquirement, gained through her

(Testimony of Hyde Gillette.)

endeavors at self-support. She is blessed with an analytical mind, a keen sense of humor, a delightful personality, an innate kindliness with a corresponding thoughtfulness for others, besides a deep loyalty to her friends, her pupils and her work.

She is cosmopolitan in her outlook, with a strictly modern view-point, lacking in unnecessary Mid-Victorian inhibitions, and perhaps as important as any of her other qualities, her manners are delightful. She is gracious, graceful and vivacious, has a cultivated and refined speech, aristocratic and expressive hands, a delicate mouth, short wavy brown hair, changeable hazel-blue laughing eyes, and is altogether lovely and loveable, as I see her.

My very informal and intimate pictures of her, which I inclose, are intended strictly for our family circle, as she would not have them seen by outsiders, under any circumstance. I wished you to be better acquainted with her general appearance, unstudied though it be.

This entire subject is laid before you, frankly and candidly, with the desire that it be treated in a similar manner, and with the very sincere hope that it may have your favorable consideration.

With much love to you three dear ones, and with the anticipation that our "Birthday celebration" may be the happiest possible, I am, as always,

Affectionately your

/s/ DADA.

Filed T. C. U. S. June 10, 1948.

(Testimony of Hyde Gillette.)

Petitioner's Exhibit 20 was admitted in evidence and the witness testified in respect thereof as follows. I first learned of my father's contemplated remarriage by this letter dated May 8, 1938, from him to me which I received through the mail. This letter is the first notice I received that my father contemplated remarriage. I thought that if that was what he wanted to do he should do it. I was perfectly happy to have him do it. I discussed the subject with Mr. and Mrs. Will and with Mr. and Mrs. Jenks. My brother Edwin was in Pasadena and we had no correspondence on the subject. My sister Helen was here in Chicago but I don't recall discussing it [31] with her. I may have but I don't recall specifically. My sister Marietta expressed to me that she thought the marriage was a very fine idea. As I recall I received no expression of my sister Helen's feeling in regard to the matter.

Mr. and Mrs. Jenks seemed quite unhappy at the idea of the marriage because they didn't see how my father could afford to take that step. They pointed out that he was receiving only \$6,000 from his interest in the Michigan Avenue property, that they had not received any interest on the note he had given my aunt and they didn't feel that he should take on any additional obligations. They didn't seem to show much regard for his feeling in the matter but simply stated that they thought it was a rather foolhardy thing for him to do and that it would involve additional expenses. Mr. Jenks in particular pointed out that if it did involve addi-

(Testimony of Hyde Gillette.)

tional expenses my father might possibly encumber my aunt's interest in the Hartford Building as well as in the Michigan Avenue property in attempting to finance his additional expenses.

The first discussion I had with Mr. and Mrs. Jenks about my father's remarriage was sometime in May at their apartment at 10 East Schiller Street. Nothing was mentioned at this time about transferring the Hartford Building into trust or otherwise. Nothing whatsoever was mentioned about the disposition of any property which my father owned. I only listened to their objections to the marriage. I can't tell exactly how often I discussed the subject with Mr. and Mrs. [32] Jenks during the summer of 1938 but I recall discussing the matter several times with Mr. Jenks. Once or twice at least in Chicago before he went to the country and on week-ends when he would bring the subject up in respect to my aunt's not getting any interest on the notes. In fact he was quite bitter about the matter and pointed out that she had received no interest since my mother died and he didn't think that was any way to treat an obligation. He seemed really to feel very strongly on the subject.

In those discussions Mr. Jenks also mentioned that Mrs. Jenks' interest in the Michigan Avenue property might be jeopardized if my father found it necessary to encumber his interest in any way. My uncle reminded me that my father had made a mortgage on the Hartford Building in 1921 for his personal use in the amount of \$70,000 and with an

(Testimony of Hyde Gillette.)

extravagant wife—and he said he didn't know whether the new wife would be extravagant or not—he might do it again. My uncle stated that he didn't have too much confidence in the way my father handled his business affairs.

In the later discussions I had with Mr. Jenks, in which my brother-in-law joined, Mr. Jenks pointed out that in connection with the possibility of my father's encumbering the Michigan Avenue property it might be ruinous for the two families because it represented their only remaining source of income, and if the Lehmann's who were the lessees elected to exercise their option it might not be possible to give them [33] the clear title which we had mortgaged the property to do. He made quite a point of that with me.

These discussions occurred week-ends at Lake Beulah and the first one or two at Mr. Jenks' apartment in Chicago, starting shortly after I received the letter from my father on May 8, 1938 and lasting pretty much through the summer.

I was very unhappy at the attitude Mr. Jenks took because while I had heard that there was some indebtedness that my father owed my aunt I had no idea that he felt so strongly about it. I did feel as the oldest in the family that if there was anything I could do to keep a rift from developing in the family I would like to do it. I didn't know exactly what I could do but I resolved to try to do something to obviate the possibility of Mr. Jenks saying to my father just how strongly he did feel about this note

(Testimony of Hyde Gillette.)

and creating a very serious breach between the two families. There had been some rather acrimonious exchanges of letters between the families from time to time in the past, and I knew that my father would become excited and extremely headstrong if my uncle told him what he had told me. I consulted with Wilson & McIlvaine, attorneys, on how to handle the matter. I talked to some of the men, including my brother-in-law, Howard Will, telling them the situation. Out of those discussions it was felt that perhaps the indebtedness my father owed to his sister might be secured by his interest in the Hartford Building. That idea was attractive to me because he had not gotten [34] anything from the Hartford Building up to that time with the exception of that January payment I mentioned earlier and it didn't seem to me that he would be sacrificing anything of any value to get this note off his back and permit a continuation of family harmony. Further discussions resulted in the decision that since I was handling the Hartford Building I might as well be appointed as trustee and his interest in the Hartford Building transferred in trust to me. I realized, however, that Mr. Jenks was adamant on Mrs. Jenks receiving some interest and since the earnings of the Hartford Building were uncertain after mortgage interest, repairs, and taxes, I felt that I should see to it that she was absolutely guaranteed at least \$1,000 a year out of approximately \$2,000 interest which was due her. Therefore, I proposed that that part of my father's \$6,000 income from the Michigan

(Testimony of Hyde Gillette.)

Avenue property supply an assured \$1,000 to Mrs. Jenks and provisions to effect that arrangement be included in the Hartford trust. I felt that it was expedient to have the Michigan Avenue property transferred to me in trust to assure these payments.

The Michigan Avenue trust was also created to serve another purpose. We felt that it was extremely important that the family be able to deliver title without delay under its bond to the lessees of the Michigan Avenue property, and Mr. Jenks raised the point that if my father's marriage were not successful it was possible that an uncooperative wife might hamper the transfer under the option agreement of the Michigan [35] Avenue property and that it might then go into default. That was the sole source of income of both families and Mr. Jenks took a very adamant view of that particular phase of the Michigan Avenue property matter. There was a third reason that the Michigan Avenue trust was set up and that was to make it more difficult for my father to encumber the property in which my aunt also had an undivided one-half interest. It was a revocable, not an irrevocable trust and if my father wanted to he could revoke the trust and do as he wanted with his one-half interest. I explained it to him feeling that he should thoroughly understand the arrangement but hoping that he would not exercise his right to revoke the trust.

I sought the advice of Wilson & McIlvaine in having these instruments prepared and they prepared the trust. I believe that Mr. Will in their

(Testimony of Hyde Gillette.)

office worked on them primarily. I think the attorneys first mentioned a prenuptial agreement but I don't recall just when. My brother-in-law Mr. Will prepared the trust instruments both for the Hartford Building and Michigan Avenue property.

The first time I saw my father after receipt of the letter of May 8, 1938, Petitioner's Exhibit 20, was when he arrived from the West on about the first of August, 1938. Prior to that time I had not advised him of any plans to make transfers of the property. I felt that since the reason in my mind was to satisfy the Jenks I didn't want to engage in correspondence on the subject and felt that I should wait until he [36] arrived to handle it orally. I didn't want to create any friction between him and the Jenks. Prior to the time I saw my father in the early part of August 1938, Mr. Will and I explained in general terms to Mr. and Mrs. Jenks what we contemplated doing to satisfy them and they appeared agreeable to the plan.

I believe I originated the plan to transfer the Lake Beulah home. There were two reasons for this. One, when Mr. and Mrs. Jenks first talked to me in May 1938 they indicated some complications in having a new head of the family brought up to Lake Beulah. Also in June when Miss O'Neil came East she mentioned that she understood the family had always regarded Lake Beulah as a Gillette institution and she didn't want to come up and be a fifth wheel as far as the management of the house was concerned. I suggested that under the circum-

(Testimony of Hyde Gillette.)

stances in order to preserve what had been in the family since 1893 as a Gileltte institution and relieve my father of the expense of his share of it that he might consider making a gift of his half to his children to enjoy during his lifetime. The members of the Jenks and Gillette family gathered at Lake Beulah every summer. The Jenks family were always there and the Gillette family were there every summer that I can remember until my mother died. Then my father came East and went up there almost every summer until 1938, and some of the children who were married went up there from time to time in the summer, most of them quite frequently, and brought their families. [37]

When I saw Miss O'Neil in June 1938 I told her that there was some problem created by the Jenks' attitude for financial reasons. I explained to Miss O'Neil that their attitude wasn't through any lack of regard for my father but rather that there was this indebtedness which Mr. Jenks felt something should be done about. I said that Mr. Will and I were working on a plan which we though might take care of the matter and not jeopardize my father's interest. I think I mentioned in very general terms what the plan involved but I don't recall how specific I was on the subject. The plan had not been completely formulated at that time. It was still in the stage of thinking about ways and means that could be figured out to satisfy the Jenks and to keep everybody happy.

It wasn't until we had further talks with the

(Testimony of Hyde Gillette.)

Jenks at Lake Beulah on week-ends that Mr. Will and I arrived at a definite plan. The plan was entirely completed before my father came East in August 1938 but no documents had been drawn because I wanted to discuss it with him and see what he thought of it. I did discuss it with him about August 1, the day he arrived, when he had luncheon with me at the University Club. I told him in general terms of my uncle's attitude toward getting some payment on the notes, and I pointed out that I thought he had some grounds for feeling as he did. Then I suggested the various arrangements to which I have already testified.

I did not tell him completely how strongly the Jenks [38] felt about his marriage because I didn't want to make him angry. For example, I remember distinctly that I decided not to tell him of the statement Mr. Jenks made that he would see that my father was sued for collection of the notes before he incurred further obligations in his marriage. I did not feel that I should tell my father of that statement and as far as I know he never knew of it.

My father's reaction to the plan was that if Howard and I thought it was all right and it met the problems that had arisen for us to go ahead and draw up the instruments. We did not discuss it with him much after the instruments were prepared. He left the matter entirely in our hands. I do not recall having any special or extended conference going over the documents with him except

(Testimony of Hyde Gillette.)

that I did try to make and felt duty bound to make it perfectly clear to him exactly what they meant and what they covered. I discussed the general form of these instruments with Mr. Will on week-ends at Lake Beulah and in general what instruments should be prepared. I listened to what he had to say on the subject but I did not discuss the detailed language of the instruments with him at any time. I left that in his hands as my attorney.

I originated the idea that the trust of the Michigan Avenue property should pay the amount of \$1,500 to Mrs. Gillette if she married my father and should survive him. In thinking of the matter during the summer I realized that I would have to make the arrangements I was trying to make [39] acceptable to him, and I knew that he couldn't feel happy in his marriage if he had not made some provision for his contemplated wife and that was the reason that I suggested the figure to him and suggested that arrangement.

Howard Will told me that his reason for suggesting a prenuptial agreement was that it was necessary for general legal reasons to make the other arrangements stick, but I didn't go into detail on the subject and the idea had not occurred to me. I was present when the prenuptial agreement was signed. It was signed in my office. Mr. Will, my father and Miss O'Neil also were present.

At the time I discussed these transfers with my father in the early part of August 1938 there was no discussion of the subject of his will.

(Testimony of Hyde Gillette.)

After he arrived at Lake Beulah in August of 1938 I went up each week-end until he left about September 20th and saw him on all of those week-ends with the exception of two when he was away visiting in Kenilworth in September. On those visits I do not recall any specific discussion that I had with my father on the subject of these transfers but we may have had casual conversations. I was not present on any occasion during which these transfers were discussed between Mr. and Mrs. Jenks and my father. It was my purpose in planning the transfers to keep the two families apart and as far as I know I did keep them from discussing the matter, at least in my presence. [40]

Cross-Examination

By Mr. Hart:

I did not take a general business course at Princeton. I graduated with a degree of A.B. I spent two years in Harvard Business College which is the regular course for a Master of Business Administration degree. Harvard is reputed to be one of the outstanding business schools in the country. In my courses at Harvard I did not study, consider or discuss estate tax or inheritance tax laws.

My father was born October 19, 1863. I first learned of his intended marriage to Miss O'Neil in May of 1938. I do not recall getting the reaction of my brother Edwin or my sister Helen toward that marriage. I do not recall that they ever expressed any opposition to it.

(Testimony of Hyde Gillette.)

In 1938 my uncle Mr. Jenks was approximately 60 years old. The Jenks lived in Chicago in their apartment in the early part of the winter and went up to Lake Beulah in the summer time. They lived very quietly and very simply. They liked to travel and in their earlier life they did travel in Europe and South America and in their later life confined their travel mostly to this country. Mr. Jenks at this time was not regularly employed.

When Mr. and Mrs. Jenks heard in the spring of 1938 of the impending marriage they did not favor it. They were opposed to it because with my father's limited income they couldn't see how he could possibly afford the additional expense of marriage. Further, he had not honored the note which he had given his sister Mrs. Jenks for \$41,650. Also, if he [41] did get married it was probable that it would cost him more than it would to live singly. He apparently did not have enough money to honor his obligations living singly and if it did cost him more it might lead to an encumbrance of either the Hartford property or the Michigan Avenue property which might jeopardize his sister's interest in those properties. At that time the Michigan Avenue property constituted the sole source of income of Mr. Gillette and Mrs. Jenks.

The provisions of the Hartford Building and Michigan Avenue trusts were planned by me and my counsel, Mr. Will, and his associates at the law firm of Wilson & McIlvaine. I did not suggest the details because I knew no law. I knew what I

(Testimony of Hyde Gillette.)

wished to accomplish. I do not remember showing the trust instruments to Mrs. Jenks before they were signed. Mrs. Jenks would not have understood them and there was no occasion to show them to her except to tell her in a general way what they contained, which I did. They may and probably were shown to Mr. Jenks by Mr. Will.

The Hartford trust provided that the note and interest would be paid by me as trustee. The net income from the Hartford Building in 1938 was little more than sufficient to make the distributions which are shown in the statement submitted to the court as one of the exhibits. The only property producing any appreciable income was the Michigan Avenue property. One-half of that income went to my aunt and one-half to my father. Mr. Jenks made no suggestion of getting [42] interest paid on the note. All he said that if interest wasn't paid he didn't see how my father was justified in getting married. I took it upon myself to find a way. The method I found was acceptable to Mr. Jenks on behalf of his wife because it included a guarantee from the Michigan Avenue trust of at least \$1,000 of the approximate total of \$2,000 interest due on the note each year. The reason we made that provision was because I felt a strong obligation to give my aunt real assurance that she would get at least \$1,000 interest. We weren't sure that she would get even that from the Hartford Building at that time. I showed her and I showed my father that the Hart-

(Testimony of Hyde Gillette.)

ford Building was gradually improving and I thought that the earnings would also improve.

This \$1,000 guarantee from the Michigan Avenue trust meant that if no interest was paid on the note by the Hartford trust then under the provision in the Michigan Avenue trust it would pay \$1,000 to Mrs. Jenks, and if \$500 is paid by the Hartford trust the Michigan Avenue trust would pay just \$500. The Michigan Avenue trust was revocable. Mr. Jenks made no comment on that. If Mr. Gillette had desired he could stop that \$1,000 from going to Mrs. Jenks by revoking the trust. After these two trusts were made my father's only source of income was from the Michigan Avenue property. The attorneys made the provision for ultimate distribution of the property in the Hartford trust.

I explained the entire document in general to my father and gave it to him to read. I do not recall explaining the provision for distribution at termination to him specifically. I talked to him about these documents more in terms of the general principles involved, telling him that my one purpose was to permit him to continue a happy life in the way he wished and at the moment that involved making it possible for him to get married with the friendly feeling of all the family.

As trustee of the Hartford trust I have paid the interest on the note to Mrs. Jenks since 1938. It has not been necessary to call upon the Michigan Avenue trust income for any part of that interest. In 1939 I paid to Mrs. Jenks the exact amount of

(Testimony of Hyde Gillette.)

interest of 5% on \$41,650. Mrs. Jenks conveyed her interest in the Hartford Building to me as trustee in 1940. I think the indenture is dated December 14, 1940. The beneficiaries of that trust from the standpoint of income are her nieces and nephews. I do not recall the provisions in respect of the corpus of the trust.

In 1939 when the Michigan Avenue property was sold Mrs. Jenks shared in that. Her share of the balance was \$150,000. She requested me to invest this sum in securities for her benefit. She did not place the money in trust. She still owns the securities which I manage for her. An associate of mine in my office prepares Mrs. Jenks' federal tax returns for her. We started doing that sometime in the 1930s, I think. They are filed with the Collector of Internal Revenue at Chicago. [44]

Prior to 1938, in theory the expenses of the Lake Beulah property were borne by Mr. and Mrs. Jenks and my father equally but my father very seldom contributed his portion of the total expenses and the Jenks paid the larger portion of those expenses. My sister and I spent week-ends at that property and some of us went there for our summer vacations in some of the years after my mother's death. That house had about eight bedrooms and it was built to accommodate two families.

Mr. Taylor, in response to a query by the court: It may be stipulated that William S. Jenks died in November 1941.

HOWARD A. WILL

a witness for petitioner, testified as follows:

Mr. Taylor: Mr. Will is not an attorney of record in this case.

Direct Examination

By Mr. Taylor:

I am 49 years old and I am a lawyer. I live in Winnetka, Illinois. I have lived in and around Chicago since 1924 and have been engaged in the practice of law since 1924. I am now with the law firm of McDermott, Will & Emery. I have been with that firm since June of 1941. Prior to that time I was associated with the law firm of Wilson & McIlvaine for more than ten years. I am the son-in-law of Edwin F. Gillette and the husband of his daughter Marietta. [45]

I am familiar with Exhibits 1 and 2. I did most of the preparation of these documents when I was with the firm of Wilson & McIlvaine, with assistance from one of my seniors in that firm. I was first approached on the subject of preparing those trust instruments during July or August of 1938 by Mr. Hyde Gillette.

I talked with Mr. and Mrs. Jenks on several occasions on the subject of Mr. Gillette's contemplated marriage. I first discussed it with them in May of 1938 while visiting them in their apartment in Chicago. Mr. Jenks was opposed to the marriage. He said Mr. Gillette could not afford it. Mrs. Jenks

(Testimony of Howard A. Will.)

had less to say than he did, but expressed some concern along the same lines. I first met Mr. Gillette in September of 1936. I met Mr. and Mrs. Jenks on the same day. I was a guest at the home at Lake Beulah.

I was present at discussions by Mr. and Mrs. Jenks of Mr. Gillette's contemplated marriage three or four times at least before they went to Lake Beulah about the middle of June 1938. I was up at Lake Beulah each week-end during that summer and Mr. Jenks brought up the subject practically every week-end that I was there. He felt very strongly on the subject and his feeling seemed to get stronger the more he talked about it. He was almost shouting in some of those discussions. He said something had to be done about the obligations that Mr. Gillette had to Mrs. Jenks or he would stop the marriage or bring suit on the notes. [46]

This matter was discussed on numerous occasions between me and Hyde Gillette. He approached me first on the matter. Hyde pointed out the feeling that was developing between Mr. and Mrs. Jenks and his father. He expressed concern that it would lead to a family rift and asked me if something couldn't be done to try to keep harmony between the families. I don't recall who originated the idea of the trust. That happened ten years ago. I am inclined to think I may have suggested it first. I must have devoted six or eight days, exclusive of my conversations with Hyde Gillette and Mr. and Mrs. Jenks, to the preparation of the trust instruments.

(Testimony of Howard A. Will.)

Mr. Stuart J. Templeton, one of the senior men with my firm of Wilson & McIlvaine, worked with me in preparing the documents. He originated the idea of the antenuptial agreement. He stated that he had some doubt that the other transfers would stand up legally unless along with them there was a prenuptial agreement in which we recited that the transfers had been made, the approximate value of the property transferred and that retained by Mr. Gillette, and that this was made clear to Miss O'Neil and incorporated in an agreement in which there was substantial or valid consideration.

I discussed with Mr. Templeton the trust of the Michigan Avenue property more than I did the other trust because of a touchy situation there. That property was under option or contract of sale to the Lehmann family, and Mr. Gillette and Mrs. Jenks had given a bond that when that option [47] was exercised they would give good title free of dower rights. They had also given a mortgage on that property securing that bond. That concerned me as a lawyer and I gave that document more attention than the other one. The prenuptial agreement recited that that property had been put in a revocable trust. It showed that the consideration for the agreement was \$1,500 per year payments to Miss O'Neil, the intended Mrs. Gillette. It also had the provision that Miss O'Neil, when requested to do so, would join with Mr. Gillette in signing any deeds or mortgages pertaining to property which he owned or might thereafter acquire, and it had her

(Testimony of Howard A. Will.)

release dower rights as to that property and others.

I discussed these instruments many times with Hyde Gillette, even before I started preparing them. I discussed that with him as early as June of 1938, and from then right up to the time they were executed.

I regarded it expedient to put that property into trust. I felt that it should be in trust so that good title could be given to the Lehmanns in the event they exercised their option to purchase the property. I had not met Miss O'Neil at that time. I knew there was a difference in age between her and Mr. Gillette. As a lawyer, I knew that in such situations as that there is always danger of the marriage not working out and the two becoming estranged. As a lawyer I did not feel I should recommend any kind of a thing that would let Mr. Gillette be in a position where he might have to go to [48] Mrs. Gillette, if they were estranged, and ask her to join with him in conveying that property to the Lehmanns. That was pointed out to Hyde Gillette.

I first met Miss O'Neil on the day she signed the prenuptial agreement, September 19, 1938. That agreement had been prepared and given to Mr. Edwin Gillette two days prior thereto when he signed the trusts, and he was to take the agreement with him and discuss it with Miss O'Neil. She came in to Mr. Hyde Gillette's office on Monday, the 19th, along with Mr. Gillette.

I had discussed the trust instruments with the

(Testimony of Howard A. Will.)

deceased in a general way prior to September 17 when he came to my office to sign them. On that day I went over the instruments with him, high-spotted the important provisions, and we discussed them rather thoroughly at that time.

The bond option agreement and other documents in relation to the Michigan Avenue property to which I have referred are Petitioner's Exhibits 13, 14 and 15. I was familiar with those documents when I prepared the trust instruments, Exhibits 1 and 2.

At the time Miss O'Neil came to Mr. Gillette's office to sign the antenuptial agreement I suggested to her that she employ counsel to review the documents in her behalf. She did not so employ counsel. I remember distinctly her saying that she felt that she did not need counsel in that matter.

My discussions with Mr. Jenks included discussions [49] about the Michigan Avenue property. He was very familiar with the situation there. He had negotiated that transaction whereby the option had been given and he thought it had been a good business deal. He took pride in discussing it with me. The matter was discussed in relation to the remarriage from the standpoint of the complications that might arise in the consummation of the sale if the marriage did not prove successful. Mr. Jenks expressed anxiety on that point on several occasions and thought that title to the property should be out of Mr. Gillette's name before he married and in the name of some trustee so that these possible

(Testimony of Howard A. Will.)

complications would not arise. I remember discussing that with both of them on one occasion. Mr. Jenks talked pretty loudly and it was rather embarrassing up at the summer home talking those financial family matters around the house. Other people were hearing it. On one occasion Hyde and I got Mr. and Mrs. Jenks in a car and drove about 300 yards away from the cottage and talked those matters over with them at that time.

Mr. and Mrs. Jenks also on these occasions discussed the Lake Beulah property. Mr. Jenks' feeling was not as strong on that as it was on the business properties but he was concerned because Mr. Gillette did not always pay his one-half of the expenses, and with a new wife payment of those expenses was more doubtful. Mr. Jenks thought that perhaps the Gillettes would not be using it much and Mr. Gillette should be relieved of the burden of the upkeep of that property [50] and it should be transferred to the children who were using it. Mrs. Jenks was present and engaged in the discussions relative to the Lake Beulah property.

Cross-Examination

By Mr. Hart:

Both Mr. and Mrs. Jenks felt that Mr. Gillette could not afford to marry. After the various instruments were prepared they were explained to Mr. and Mrs. Jenks. With those documents they then felt that Mr. Gillette could afford to get married. The Lake Beulah expense had been taken off his

(Testimony of Howard A. Will.)

hands and provisions had been made for paying interest on the note. At that time Mr. Gillette's only substantial income was \$6,000 a year from the Michigan Avenue property. It was possible for this income to be cut down after the trusts had been created depending on the earnings of the Hartford Building. Mr. and Mrs. Jenks were satisfied with that situation.

The law firm of Wilson & McIlvaine is not one of the largest in Chicago in numbers of lawyers. It is a well-established firm. The firm handled Federal tax matters. I didn't do that work so much. Mr. Templeton and Mr. Damon would be familiar with such matters.

I first met Miss O'Neil at the time she signed the prenuptial agreement the 19th of September. My wife had met her prior to that time. I knew personally nothing about Miss O'Neil but Marietta had known her and thought well of her.

The plan of the two trusts was discussed quite thoroughly between Hyde Gillette and myself prior to the time [51] the decedent arrived in Chicago. I don't know whether Hyde Gillette knew of the tax consequences of the transfers but we probably discussed that in a general way.

Mr. Edwin Gillette never came to my office until the day the documents were signed. Hyde and I had discussed the plan in a general way and then when Mr. Gillette came to Chicago about the first of August Hyde discussed the plan with him. I did not sit in on any of those discussions. Thereafter I

(Testimony of Howard A. Will.)

started drawing the instruments. I can't tell you exactly, but I think it must have been pointed out to Mr. Gillette that the corpus of the Michigan Avenue trust would eventually go to his four children. I don't recall that I explained to Mr. Gillette that if the Michigan Avenue trust was not revoked it provided for complete disposition of the property and he would have to do no more respecting the disposition of that property. I don't believe we got into such detail. Mr. Gillette was not a business man. He wasn't a man whom you can discuss complicated business matters with very well.

It was my impression that he had great love for his children. I can't recall that he ever definitely expressed an interest to make provision for their welfare. We had no extended conversation on that subject which would lead me to be able to tell you that that was my impression. He never said that he wanted his property divided after his death among his children. I had no such discussions as that with him.

I did not prepare Mr. Gillette's last will. I never saw it before he died. I didn't even know that it had been prepared. [52]

Mr. Jenks was quite concerned about the title on the Michigan Avenue property. After the Michigan Avenue trust was drawn I discussed with Mr. Jenks the fact that Mr. Gillette could revoke that trust and draw the title back to himself. However, Mr. Jenks was satisfied with that trust along with the prenuptial agreement.

(Testimony of Howard A. Will.)

One of the effects of the prenuptial agreement was to cut out the dower interest of Mrs. Gillette provided the document was held to be legal. I discussed with Hyde Gillette the question of a wife's dower rights and explained to him that the minute his father and Miss O'Neil were married she would have an inchoate right of dower in the property and it would be necessary for her to join in any deeds if the property was sold. I have no definite recollection but I suspect that we also discussed the fact that her right would come into enjoyment at Mr. Gillette's death. One of the effects of the prenuptial agreement was that she relinquish that right. She also got a life annuity of \$1,500 if she survived Mr. Gillette.

Mr. and Mrs. Jenks did not insist on the trust provisions for distribution of the corpus. I don't believe that they knew the details to that extent. Their interest was in the Hartford Trust, the primary interest was to get the note secured, the Michigan Avenue Trust was to get title out of Mr. Gillette so the sale could be made if the Lehmanns exercised their option, or so Mr. Gillette could not get the property encumbered in some way which would hurt Mr. and Mrs. Jenks. [53] Mr. Gillette could encumber the Michigan Avenue property even after the trust by first revoking the trust.

I don't know how much Miss O'Neil studied the prenuptial agreement over the week-end. I gave that document to Mr. Gillette on a Saturday and suggested that it be taken out and discussed with

(Testimony of Howard A. Will.)

Harriette. When she came into Hyde Gillette's office to sign it we discussed it. I would not say that she treated it casually.

I drew the trust indenture for Mrs. Jenks in December 1940 in which she transferred her half interest in the Hartford Building to Hyde Gillette as trustee. She transferred only her half interest, not the note. Under that trust the income was to go to her nieces and nephews during their lifetimes and on their death to their issue. On termination of the trust, as I recall it, the corpus would go to the nieces and nephews or as they should appoint. I don't know exactly what the termination event was but I think it was 21 years after the death of the last person then in being.

Further Examination

By the Court:

Mr. Gillette's interest in the Lake Beulah property was estimated by the family to be worth about \$10,000.

I have sat at the counsel table and collaborated with petitioner's counsel in this matter. I am a partner of Mr. McDermott who is the original counsel in this case.

After 1938 the Lake Beulah property was used by Mr. and Mrs. Jenks every summer up to Mr. Jenks' death. One of [54] Mr. Gillette's daughters, Helen, was married there and used it some at that time. I think possibly Mr. Gillette came one other summer and spent a little time there. My wife

(Testimony of Howard A. Will.)

used it a lot and our children and Hyde Gillette and his family used it.

The Lehmanns exercised their option to purchase the Michigan Avenue property on March 1, 1939 and I closed the deal in April of 1939. In connection with that transaction no instrument of any kind was required of Mr. Gillette, Sr. The trustee gave the title. Mr. Gillette, Sr. realized that the Michigan Avenue trust was revocable and he revoked it in part at one time to get \$6,000 out of it. The trust on the Hartford Building was irrevocable. Mr. Gillette was never asked to give an irrevocable trust on the Michigan Avenue property.

No objection.

See Clerk's letter dated 9/8/49.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue.

Filed T.C.U.S. Sept. 21, 1949.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN RECORD ON REVIEW

To the Clerk of The Tax Court of the United States:

You will please transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit the following documents and records in the above-entitled cause in connection with the petition for review by the said Court of Appeals:

1. All of the documents and records in the file of The Tax Court of the United States, in accordance with paragraph (1) of Rule 11 of the rules of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure.

2. The Narrative Statement of Evidence filed by petitioner in the above-entitled cause, in accordance with Rule 75 of the Federal Rules of Civil Procedure.

Said documents to be certified and transmitted as required by law and the Rules of the United States Court of Appeals for the Ninth Circuit.

/s/ JOHN S. PENNELL,
Attorney for Petitioner.

[Affidavit of Mailing Attached.]

Filed T. C. U. S. Sept. 21, 1949.

The Tax Court of the United States
Washington

Docket No. 15623

ESTATE OF EDWIN F. GILLETTE, HAR-
RIETTE O'NEIL GILLETTE, Executrix,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 33, inclusive, constitute and are all of the original papers and proceedings on file in my office as the original and complete record in the proceeding before The Tax Court of the United States entitled: "Estate of Edwin F. Gillette, Harriette O'Neil Gillette, Executrix, Petitioner, v. Commissioner of Internal Revenue, Respondent," Docket No. 15623, and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office, and a Narrative Statement of Evidence supplied by appellant and bearing "no objection" of respondent, the same having been submitted and designated by appellant to be included here along with the original transcript of evidence pursuant to advice contained in a letter dated September 8, 1949 from the Clerk of the U. S. Court of Appeals, Ninth Circuit, to appellant, according to appellant's representation to me.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 7th day of October, 1949.

[Seal] /s/ VICTOR S. MERSCH,

Clerk, The Tax Court of
the United States.

[Endorsed]: No. 12379. United States Court of Appeals for the Ninth Circuit. Estate of Edwin F. Gillette, Harriette O'Neil Gillette, Executrix, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States. Filed October 14, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

Docket No. 12379

ESTATE OF EDWIN F. GILLETTE, HAR-
RIETTE O'NEIL GILLETTE, Executrix,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS
TO BE RELIED UPON

Harriette O'Neil Gillette, Executrix of the Estate of Edwin F. Gillette, petitioner herein, by her attorneys, E. H. McDermott, Wm. M. Emery, and J. S. Pennell, hereby states that she intends to rely upon the following points in this proceeding:

That the Tax Court of the United States erred:

1. In holding and deciding that transfers of his interest in property known as the Hartford Building in Chicago, Illinois, and the Lake Beulah property at Lake Beulah, Wisconsin, made by decedent on September 17, 1938, were made in contemplation of death.

2. In failing to hold and decide that said transfers of property made by decedent on September 17, 1938 were not made in contemplation of death but were motivated by other considerations associated with continued life.

3. In disregarding substantial and uncontroverted evidence that decedent did not contemplate death in 1938 and that the transfers of property made by him in that year were prompted solely by financial considerations and the desire to be married with the approval of his entire family and by other considerations associated with continued life and not death.

4. In holding and deciding that petitioner failed to overcome the presumption of correctness attaching to the Commissioner's determination.

5. In giving evidentiary weight to the original presumption of correctness attaching to the Commissioner's determination and in failing to hold and decide that said presumption disappeared upon the introduction of evidence tending to prove that the transfers were not in contemplation of death.

6. In that its decision is contrary to law, is clearly erroneous, and is not supported by substantial evidence.

7. In ordering and deciding that there is a deficiency in estate tax of \$37,933.11 and in failing to order and decide that there was an overpayment of estate tax of at least \$1,275.76.

/s/ JOHN S. PENNELL,
Attorney for Petitioner.

Affidavit of Service by mail attached.

[Endorsed]: Filed Oct. 17, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ALL OF THE RECORD
MATERIAL TO THE CONSIDERATION
OF THE REVIEW.

Harriette O'Neill Gillette, Executrix of the Estate of Edwin F. Gillette, petitioner herein, by her attorneys, E. H. McDermott, Wm. M. Emery and J. S. Pennell, hereby states that the following documents and portions of the record are material to the consideration of the review:

1. Docket entries of the proceedings before the Tax Court.

2. Pleadings before the Tax Court.

(a) Petition, together with attached Exhibit A (notice and Statement of Deficiency).

(b) Petitioner's motion to amend petition, together with court's order entered thereon.

(c) Answer.

3. Stipulation of Facts, together with Exhibits 1 through 4, inclusive, referred to therein and attached thereto.

4. Petitioner's Exhibits 5 through 20, inclusive.

5. Respondent's Exhibit A.

6. Petitioner's Narrative Statement of Evidence.

7. Memorandum Findings of Fact and Opinion of the Tax Court.

8. Order of the Tax Court dated January 25, 1949 amending Memorandum Findings of Fact and Opinion of the Tax Court.

9. Order of the Tax Court dated February 10, 1949, correcting and modifying Memorandum Findings of Fact and Opinion of the Tax Court.

10. (a) Respondent's computation for entry of decision under Rule 50, together with petitioner's consent thereto.

(b) Decision of the Tax Court.

11. Petition for Review, together with Notice of Filing Petition for Review and Affidavit of Mailing of Notice of Filing Petition for Review and Petition for Review.

12. Any and all orders made by the Tax Court or by this Court with respect to the enlargement of

time for the preparation and transmission of the record on review.

13. Designation of Portions of Record, Proceedings and Evidence To Be Contained in Record on Review.

14. Statement of Points To Be Relied Upon filed with this Court, together with Affidavit of Mailing attached thereto.

15. This Designation of All of the Record Material to the Consideration of the Review.

16. Motion to Consider Portions of Record in Original Form.

/s/ JOHN S. PENNELL,
Attorney for Petitioner.

[Affidavit of Mailing Attached.]

[Endorsed]: Filed Oct. 17, 1949.

[Title of Court of Appeals and Cause.]

MOTION TO CONSIDER PORTIONS
OF RECORD IN ORIGINAL FORM

Harriette O'Neil Gillette, Executrix of the Estate of Edwin F. Gillette, petitioner herein, by her attorneys, E. H. McDermott, Wm. M. Emory and J. S. Pennell, respectfully moves that the following documents contained in the record on review in this Court and previously designated by petitioner as being material to the consideration of the review, be not reproduced in the printed record on review, but that they be considered by the Court in their

original form and that permission be granted to the parties hereto to refer in briefs and arguments to said documents and the contents thereof:

1. Respondent's Exhibit A.

2. Petitioner's Exhibits 1 through 15 inclusive.

In support whereof petitioner respectfully shows as follows:

The above listed exhibits, although material to the consideration of the review, contain much extraneous matter not here material. The essential portions of said exhibits were discussed at the hearing before The Tax Court of the United States which discussion appears in the Narrative Statement of Evidence, designated for printing. Said exhibits are voluminous and in some respects difficult and expensive to reproduce. It is believed that the reproduction thereof in the printed record would serve no useful purpose but would unduly burden the record, and unreasonably increase the cost of printing the record.

Wherefore, petitioner prays that this motion be granted.

/s/ JOHN S. PENNELL,

Attorney for Petitioner.

So Ordered:

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

/s/ WARREN A. POPE,

United States Circuit Judges.

Affidavit of service by mail attached.

[Endorsed]: Filed Oct. 19, 1949.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT.

ESTATE OF EDWIN F. GILLETTE, HARRIETTE O'NEIL
GILLETTE, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

EDWARD H. McDERMOTT,
WM. M. EMERY,
JOHN S. PENNELL,
111 West Monroe Street,
Chicago, Illinois,
Counsel for Petitioner.



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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

ESTATE OF EDWIN F. GILLETTE, HARRIETTE O'NEIL
GILLETTE, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

JURISDICTION.

This case arises on petition to review a decision of the Tax Court of the United States determining an estate tax deficiency of \$37,933.11 against petitioner.

Jurisdiction and venue in this Court are predicated upon Secs. 1141, as amended, and 1142, Internal Revenue Code. The petition for review (R. 104) was filed on July 22, 1949, within three months after the Tax Court's decision on April 27, 1949. (R. 103) Petitioner's estate tax return was filed with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California. (R. 96-97, 88)

Jurisdiction of the Tax Court was based upon Secs. 1101 and 871, Internal Revenue Code. The petition for redetermination (R. 4) was filed on August 28, 1947, within 90 days after the respondent's notice of deficiency to petitioner (R. 9) was mailed on June 20, 1947. (R. 5, 15)

STATEMENT OF THE CASE.

The sole issue is whether transfers made by decedent, Edwin F. Gillette, on September 17, 1938 of his interest in the "Hartford Building" property located in Chicago, Illinois and in a summer residence at Lake Beulah, Wisconsin were made in contemplation of death, so that the value thereof should be included in his gross estate for estate tax purposes. (R. 72)

Edwin F. Gillette was born October 19, 1863 and died December 10, 1943. He had been a resident of Pasadena, California since 1917. He was survived by his widow, Harriette O'Neil Gillette, executrix of his estate and petitioner herein, two sons, Hyde and Edwin, and two daughters, Helen and Marietta. (R. 17, 73)

On September 17, 1938 decedent and his sister, Mrs. William S. Jenks, each owned an undivided one-half interest in the following real estate:

The Hartford Building property, located at the southwest corner of Dearborn and Madison Streets in Chicago, Illinois, acquired by inheritance from their father in 1892.

The Michigan Avenue property, acquired by inheritance from their father in 1892.

The Lake Beulah property, located at Lake Beulah, Wisconsin, acquired in 1893. (R. 17-18, 73)

On September 17, 1938, over five years before his death, decedent transferred his interest in the Hartford Building property to his son Hyde Gillette as trustee of an irrevocable trust (R. 17-18, 73; Ex. 1: R. 20), and conveyed his interest in the Lake Beulah property by warranty deed to his four children. (R. 17-18, 73) The Tax Court sustained respondent's determination that the transfers of the

Hartford Building and Lake Beulah properties were made in contemplation of death, and that the gross estate should be increased by the respective amounts of \$120,621.32 and \$10,000. (R. 9-11) Petitioner contests such inclusion of these transfers. The values determined by respondent are not in controversy.

On September 17, 1938 decedent also conveyed his interest in the Michigan Avenue property to Hyde Gillette as trustee of a revocable trust. (R. 17-18, 73; Ex. 2: R. 33) The contents of this latter trust as of the date of death, amounting to approximately \$225,878.81, were included in the estate tax return (Ex. A: not reproduced per Court order R. 183-184) and no controversy arises in respect thereof. This conveyance is material only insofar as its purposes were related to the purposes of the controverted transfers.

Since its acquisition the Lake Beulah property had been used jointly by the Jenks and Gillette families as a summer home with the expenses to be borne equally by decedent and the Jenks family. (R. 81-82, 118, 165) After the death of decedent's first wife in 1932 the cottage was used mostly by the Jenkses and the Gillette children living in the Chicago area. Decedent continued to make visits during the summer. (R. 115, 158, 175-176)

The Hartford Building is an old 14-story office building standing partly on the land owned jointly by decedent and Mrs. Jenks and partly on land held by an estate not concerned in this proceeding. The portion owned by decedent and Mrs. Jenks was subject to a 99-year lease, under which they had received a net rental of \$27,000 per year in equal shares prior to default of the lessee as of September 1, 1933. The lessors declared a forfeiture and obtained possession on December 1, 1933. This matter was handled for the decedent and Mrs. Jenks by Hyde Gillette who had recently graduated from the Harvard School of Business

Administration and was engaged in the investment banking business in Chicago. Thereafter, Hyde Gillette retained building managers, negotiated an operating agreement with the other estate interested in the building, negotiated a mortgage for \$85,000 to liquidate accrued taxes that the former lessee had failed to pay, and generally represented the family in connection with the property. In January, 1934 he received formal powers of attorney for these purposes from decedent and Mrs. Jenks, in the latter case acting jointly with Mr. Jenks. After the termination of the lease the net receipts from this property were substantially all required for mortgage interest and expense of fire insurance premiums, attorneys' fees and a small reserve for emergency rehabilitation. From December, 1933 to September, 1938 the sole distributions to decedent for his personal use from this property were \$310 in January, 1938, and \$593 in August, 1938. (R. 79, 137-138; Ex. 9, 10, 11: not reproduced per Court order R. 183-184)

The Michigan Avenue property, which had once been the family residence, had been leased on March 1, 1909 for a term of 198 years at a net rental of \$12,000 per year, which was received in equal shares by decedent and Mrs. Jenks. The lessees were obligated to erect a building on the property costing at least \$100,000 within 20 years. This period was extended to 30 years in 1928, and in 1931 was further extended for the life of the lease provided the lessees by March 1, 1939 should place \$100,000 in escrow as a guarantee of performance. Also in 1931 decedent and Mrs. Jenks granted an option to the lessees to purchase the property for \$375,000, \$75,000 being received as a down payment. Decedent and Mrs. Jenks gave a bond secured by a trust deed on the property to convey good title or return the \$75,000 if the lessees should elect to complete the purchase. (R. 78-79, 139-141; Ex. 12, 13, 14, 15: not reproduced per Court order R. 183-184)

The decedent was never interested in, concerned with or adept at business or financial affairs. His life was devoted to artistic and cultural pursuits. Though well educated, including a course in architecture, he followed neither that profession nor any other for a livelihood. He was interested in studying and composing poetry in French, and in doing beautiful cabinet work in his work-shop, interested himself in his fraternities and in work on their publications, in a hunt club, a choral society, a tennis and swimming club. He drove a car a great deal and was interested in photography. He devoted all of his time to such pursuits. He was never engaged in remunerative employment. (R. 78, 116, 120-122, 126-127, 135-136)

Decedent's only substantial source of income was the \$19,500 per year received under the Hartford Building and Michigan Avenue leases. (R. 115, 125, 142) He showed no interest and took no part in the management of these properties, even after the drastic reduction in the Hartford Building income after 1933, leaving such matters to his son Hyde and his brother-in-law, William S. Jenks. (R. 79, 120, 137-138) Because of his inattention to business and inability to handle his finances, the rental checks were made payable to his first wife. (R. 115, 122-124, 136) After her death in 1932, decedent's daughter Marietta handled the household finances until her marriage to Howard A. Will in 1937. (R. 115)

Despite decedent's substantial income from these two leases, he became financially involved prior to 1920 and was being pressed to meet some bank loans. In 1921 he mortgaged the Hartford Building property for five years for \$70,000. Mrs. Jenks joined in the mortgage to accommodate him, but the entire proceeds went to decedent for his personal use. (Ex. 18: R. 145; R. 153) In June, 1926 this mortgage was extended for another five years. It was satisfied some time before 1938, presumably at maturity in 1931

from the \$75,000 received in connection with the option agreement on the Michigan Avenue property. Decedent gave Mrs. Jenks his personal promissory note, with his wife as co-maker, for \$34,000, dated June 23, 1931, payable on demand and bearing interest at 5% per year payable semiannually. (R. 75, 142; Ex. 17: R. 143) The first two interest payments of \$850 were made when due, but no further payments of interest or principal were made on this note. (R. 75, 145) On December 23, 1936 this note was cancelled and a renewal note was given to Mrs. Jenks in the amount of \$41,650 covering the principal and accrued and unpaid interest. (R. 75, 142; Ex. 16: R. 144) Decedent never made any payments on this note.

In 1938 Mr. and Mrs. Jenks, Hyde Gillette and Marietta Will lived in or near Chicago. Howard A. Will had been an attorney in Chicago since about 1924. The Gillette and Jenks families had a close family relationship. Mrs. Jenks was very fond of her brother's children. She and decedent were devoted to each other. (R. 79-80)

Through his attendance at French clubs and societies, decedent had become acquainted with Harriette O'Neil, a French teacher of Pasadena, California. (R. 126) On May 8, 1938, decedent wrote a letter to each of his children stating that he and Miss O'Neil were deeply in love with each other and he had repeatedly urged her to marry him, but that she hesitated to come into the family where she might be considered an interloper and to give up the freedom which as a bachelor girl she had so long enjoyed; that he should devoutly welcome any procedure which might tend to overcome the diffidence in meeting the members of the family; that they were lovers "seeking such happiness as may be found at this late date;" and that he hoped the letter would have favorable consideration. Miss O'Neil was then age 41, the decedent 75. (R. 80; Ex. 20: R. 148)

Decedent's children, upon learning of the suggested marriage, were pleased at the prospect (except that the record does not indicate the attitude of Helen). (R. 80, 117-118, 152; Ex. 20: R. 150) However, when Hyde discussed the matter with the Jenks family shortly after he received his father's letter, Mr. Jenks took a different view, and his wife to a lesser degree. The matter was discussed by Hyde and the Jenks family several times, both in Chicago during the summer and at Lake Beulah in August and September. Howard and Marietta Will joined in some of these discussions. (R. 81, 117, 119, 129, 152-154) Mr. Jenks, who largely looked after his wife's interests, did most of the talking, and at times was loud and bitter. Both Mr. and Mrs. Jenks were unhappy over the proposed marriage. They did not see how decedent could afford to marry, and pointed out that he was receiving only \$6,000 a year from his interest in the Michigan Avenue property; that he was indebted to Mrs. Jenks on a note, upon which he was not paying the interest; and that they felt that he should not take on additional obligations; also that marriage involved additional expense, and that decedent might possibly encumber his sister's interest in the Hartford Building and Michigan Avenue properties; and that if the optionees in the Michigan Avenue property elected to purchase, it might not be possible to give clear title. Mr. Jenks pointed out that this might be ruinous for the two families because the Michigan Avenue property represented their only remaining source of income. Mr. Jenks at one time said that he would see that decedent was sued for collection of the notes before he incurred further obligations, or he would stop the marriage. (R. 81, 117, 119, 129, 152-154, 162, 166-167, 170) As to the Lake Beulah property, which was used by both families, including grandchildren, as a summer home, Mr. and Mrs. Jenks also indicated that having a new head of the family brought there might pro-

duce complications. Decedent had not been paying his share of the expenses of that property. (R. 82, 157, 165, 171)

Hyde Gillette felt that he would like to do anything he could to prevent a rift in the family. Pointing out the feeling that was developing between decedent and his sister, Hyde asked Mr. Jenks if he could not do something to keep harmony. There had been some acrimonious exchange of letters in the past which had "blown over", and Hyde knew that decedent would become excited and extremely headstrong if Mr. Jenks repeated the statements to decedent. Hyde counseled with Howard Will and his law firm, which had handled the forfeiture of the Hartford Building lease in 1933. It was felt that decedent's indebtedness to Mrs. Jenks might be secured by his interest in the Hartford Building. After further discussion it was decided that since Hyde was handling the Hartford Building, the decedent's interest therein might as well be transferred in trust to Hyde as trustee. Decedent had received only nominal income from that source since 1933, and it did not seem that he would be sacrificing anything by using this property to relieve him of his indebtedness to his sister. Mr. Jenks was adamant on Mrs. Jenks receiving some interest, and Hyde decided that he would see that she was guaranteed at least \$1,000 per year out of the approximate \$2,000 interest per year due to her. He proposed that part of the decedent's \$6,000 a year income from the Michigan Avenue property be used to assure Mrs. Jenks of the \$1,000 if the Hartford Building income should be insufficient, and he felt that a trusteeship in him, over the Michigan Avenue property, was a logical vehicle for that purpose. The Michigan Avenue trust was also created to assure delivery of clear title in case of exercise of the purchase option, as Mr. Jenks suggested that an uncooperative wife of the decedent might hamper the transfer under

the option and cause default. Such a trust would also make it more difficult for decedent to encumber his sister's interest in that property. (R. 82-83, 154-157)

The program decided upon and the documents that were later drawn to effectuate it were explained to the Jenkses. (R. 83) The program met with their approval and satisfied their objections to the marriage. (R. 157, 171) They did not insist upon the trust provisions for distribution of the corpus; they may not have known the details to that extent. Their primary interest was to get the note secured and to protect Mrs. Jenks' interest in the Hartford Building and the Michigan Avenue property. (R. 152-154, 174)

Hyde Gillette did not desire to engage in correspondence with his father on the subject. He wanted to handle it orally. He did not wish to create friction between his father and Mr. Jenks. Decedent was never told about Mr. Jenks' statement about suit on the note, but he did know that the Jenks family had objections to the marriage in connection with the indebtedness. (R. 83, 157)

On June 23, 1938 Miss O'Neil spent a day in Chicago on the way to visit further east. The decedent had previously told her that his children were pleased with the idea of the proposed marriage, that Mr. and Mrs. Jenks were not pleased, that he was behind on interest payments to her and the pressure came when the question of marriage arose. (R. 83, 129-130, 132) Miss O'Neil met Hyde at that time. They discussed the problem and the solutions then being formulated, including the possible complications in connection with the Lake Beulah property. Miss O'Neil stated that she would not want to be a fifth wheel as far as the management of the house was concerned, and she would prefer the conveyance of decedent's interest in this property to his children. She thought that probably some arrangement could be worked out to satisfy all of Mr. and Mrs. Jenks' objections. (R. 84, 130, 158)

About August 1, 1938 decedent arrived in Chicago. Hyde told his father in very general terms of the Jenks' attitude toward getting some payment on the note. He did not tell him of Mr. Jenks' threat to bring suit on the note, not wishing to make his father angry. Hyde suggested the program which by that time had been completely formulated, although no documents had been drawn. Hyde told his father that his one purpose was to permit him to continue a happy life and to get married with the friendly feeling of all the family. Decedent's reaction to the plan was that if Hyde and Howard Will "thought it was all right and it met the problems that had arisen, for us to go ahead and draw the instruments." (R. 84-85, 159)

The documents to put the final program into effect were prepared by Howard Will and others in his law firm. (R. 83, 157, 167-169) They were as follows:

(a) An irrevocable trust of the decedent's interest in the Hartford Building property with Hyde Gillette as trustee. (Ex. 1: R. 20) Hyde Gillette, as trustee, executed an agreement assuming payment from the trust assets of decedent's debt to Mrs. Jenks and indemnifying decedent against any action on the note by Mrs. Jenks or her successors in interest. (Ex. 19: R. 146) Subject to the obligation to Mrs. Jenks, the decedent's children were the beneficiaries of the trust, with possibility of remainder interests in their issue.

(b) A revocable trust of the decedent's interest in the Michigan Avenue property, with a charge on income to make up any deficiency between \$1,000 per year interest to Mrs. Jenks on her note and interest payments actually made from the Hartford Building trust. Subject to this possible charge, the trust income was to be distributed to decedent. The trust also provided for income distributions of \$1,500 per year to his widow after his death, with

the balance of the remainder interest in the children or their issue. (Ex. 2: R. 33)

(c) A conveyance of decedent's interest in the Lake Beulah property by deed to his four children. (R. 18)

(d) An antenuptial agreement between decedent and Miss O'Neil. (Ex. 3: R. 61) This had been suggested by a senior member of the law firm to avoid any doubt as to the validity of the foregoing transfers and to make her consent unnecessary in the event the lessees of the Michigan Avenue property should exercise their purchase option. (R. 86, 168-169, 174) Although it was suggested that Miss O'Neil obtain counsel, she declined to do so, having full confidence in decedent and his son in the consummation of the program. (R. 87, 131, 133)

The trust agreements and the Lake Beulah deed were executed on September 17, 1938. The antenuptial agreement was executed on September 19, 1938. (R. 17-18)

Except at the time of signing these documents, when Hyde and Howard Will attempted to explain them, there were only casual conversations with decedent concerning the plan after the initial discussion about August 1, 1938. (R. 159, 164, 169-170, 173)

Decedent and Miss O'Neil were married October 29, 1938 and lived together until his death. (R. 87, 126) On April 24, 1939 decedent executed his will, leaving all of his property to his wife. (R. 69-71, 87) He did not discuss this will with his wife, and she did not know that he had executed it until after his death. (R. 87, 133, 173) In the 1938 discussions between decedent and his son and son-in-law, the making of a will or the subject of testamentary disposition or substitution therefor was not mentioned. (R. 173)

At all times material decedent was in excellent health. He was a man of pleasant disposition, had a cheerful out-

look on life, and carried on his normal activities up to the time of his death. He had no illnesses more severe than a common cold for many years. He made occasional visits to physicians for check-up examinations, but had never summoned a physician to attend him at home prior to his last illness. He was an expert automobile driver and took many long trips. During the summers of 1938, 1939 and 1940 at Lake Beulah he went swimming every day. In 1939 and 1940 he spent a good deal of time in Estes Park, Colorado, at an altitude of 9,000 feet, repairing his cabin, trimming trees and cutting new trails. He died suddenly on December 10, 1943 from coronary thrombosis. Although for two or three weeks prior to his death he had complained of not feeling as well as usual, he did not see a physician, nor did he curtail his activities. A physician was called to see him on the day he died. About ten days before his death he drove to Los Angeles and sang a two-hour concert standing with his glee club. (R. 87-88, 116-117, 127-128) In his letter of May 8, 1938, advising his children of his proposed remarriage, he expressed himself as being young in spirit, ideals and future outlook, believing that this was sufficient to make up for the disparity in age between himself and Miss O'Neil, who was 33 years his junior. He looked forward to a happy life with Miss O'Neil. (Ex. 20: R. 148)

The lessees of the Michigan Avenue property exercised their purchase option in the spring of 1939, paying \$300,000. (R. 88) Subsequently, on September 3, 1940, decedent amended the Michigan Avenue trust to provide minimum payments to him of \$6,000 per year, payable from principal if necessary, subject to any payments necessary to be made to Mrs. Jenks. (R. 88) In fact, the income from the Hartford Building trust having been sufficient to pay interest to Mrs. Jenks, no payments have ever been made to her from the Michigan Avenue trust. (R. 164)

Petitioner filed the decedent's estate tax return on or about March 3, 1945 with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, showing total estate tax of \$45,064.39, which was paid \$12,158.49 on September 27, 1944 and \$32,905.90 on March 10, 1945. (R. 19, 88) This return did not include as a part of decedent's gross estate any interest in the Hartford Building property or the Lake Beulah property. (R. 19; Ex. A: not reproduced per Court order R. 183-184)

SPECIFICATION OF ERRORS.

I. The Tax Court erred in failing to find the following facts which were proved by substantial, uncontroverted evidence:

a. Decedent's dominant motive in making the transfers here in question was to do everything necessary to remove the objections on the part of Mr. and Mrs. Jenks to his marriage and permit that marriage to take place with the friendly feeling of his entire family.

b. The antenuptial agreement entered into contemporaneously with the transfers was for the primary purpose of insuring the validity of the transfers as against a possible future claim by Harriette O'Neil that those transfers had been in fraud of her marital rights, and of insuring the giving of good title to the Michigan Avenue property without consent of Harriette O'Neil upon exercise of the lessees' option to purchase.

c. Decedent gave no thought to the devolution of his property after his death and thoughts of death were in fact absent from his mind at the time these transfers were made.

d. The transfers were not made in contemplation of death.

II. The Tax Court erred in that its conclusions of law are contrary to the evidence and its own findings of fact, are based on its own unsupported inferences and are therefore clearly erroneous. In particular, the Tax Court erred in the following respects:

a. In holding and deciding that the transfers here in question were made in contemplation of death and are includible in decedent's gross estate under Sec. 811(c) of the Internal Revenue Code.

b. In failing to hold and decide that the transfers here in question were not made in contemplation of death and were not includible in decedent's gross estate for estate tax purposes.

c. In assuming (in disregard of the evidence) that other methods could have been used to satisfy the objections of Mr. and Mrs. Jenks and in concluding therefrom that the methods actually used were not for that purpose.

d. In disregarding the evidence and its own findings of fact as to decedent's health and mental condition which prove the absence of contemplation of death.

III. The Tax Court erred in disregarding the law in the following respects:

a. In failing to hold and decide that transfers made to enable a marriage to take place are prompted by a living motive and are not made in contemplation of death.

b. In treating as evidence the general presumption of correctness of the Commissioner's determinations, and in failing to hold and decide that that presumption disappears in the presence of evidence proving to the contrary.

c. In failing to base its decision only upon the evidence.

SUMMARY OF ARGUMENT.

I. This Court is fully empowered to review and reverse the Tax Court's decision that decedent transferred property in contemplation of death, in the same manner and to the same extent as a decision of the District Court. Under Rule 52(a), Federal Rules of Civil Procedure, as interpreted by the courts, findings of fact by the trial court are erroneous if not supported by substantial evidence, and this Court is free to draw its own inferences and conclusions from the findings of fact and the evidence. The Tax Court has disregarded material uncontroverted evidence, and has failed to give effect to many of its own findings of fact. Instead it has made inferences and conclusions unsupported by the evidence and, in some instances, inconsistent with its own findings of fact.

II. The transfers were occasioned by an affirmative living motive established by clear and uncontradicted evidence.

A. Decedent's motive was to remove an important obstacle to his marriage. His prospective bride was reluctant to accept his proposal without the consent and approval of his family. His children by a prior marriage did approve, but his sister, to whom he was closely attached, and her husband disapproved, largely because of a debt owed by decedent to his sister. Personal complications in connection with joint occupancy of the summer residence at Lake Beulah were also involved. Decedent's son, assisted by his son-in-law, an attorney, worked out a plan to meet the objections of Mr. and Mrs. Jenks and embracing the controverted transfers. This plan was suggested to and approved by decedent for the sole purpose of making possible his proposed marriage with the approval of his family.

B. Decisions in other cases establish that property transfers under comparable circumstances were not made in contemplation of death.

C. The plan was responsive to the remarriage motive. Other motives can not properly be attributed to decedent. The Tax Court's apparent inference that decedent had a long-range motive for distribution of property to his children in contemplation of death is not supported by any evidence and is completely inconsistent with his character, which had been the same for the preceding 20 years or more. From decedent's standpoint the transfers were a very reasonable means of dispelling the objections of his sister and her husband to his marriage. It is immaterial that his problem might have been solved by some different means.

D. The antenuptial agreement, an incidental document in support of other parts of the plan to remove objections to the marriage, does not support the Tax Court's decision.

III. Absence of contemplation of death is further established by other evidence. The condition of his health, the range and nature of his activities, and the fact that he was about to be married all make it unlikely that thoughts of death were in his mind in 1938, and his long record of lack of foresight and acumen in financial matters show that such thoughts, if they did exist, would not have impelled him to action.

IV. The general presumption of correctness attending determinations of the Commissioner was apparently treated as evidence by the Tax Court. This presumption disappears in the presence of any evidence, and thereafter must be disregarded. The evidence, on which the case should have been decided, shows plainly that decedent did not transfer property in contemplation of death.

STATUTE INVOLVED.

Sec. 811(c), as amended, Internal Revenue Code (26 U. S. C. § 811(c)), so far as material, provides:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *

(c) Transfers in Contemplation of, or Taking Effect at Death.—

(1) General Rule.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

(A) in contemplation of his death. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter; * * *

Sec. 811(c) was retroactively amended on October 25, 1949 to read as above by Sec. 7 of Public Law 378, 81st Congress, 1st Session, 63 Stat. This amendment made substantive changes in other provisions of Sec. 811(c), but with respect to transfers in contemplation of death the previous statutory language was merely consolidated in the new subparagraph (A), without change in language or substance.

ARGUMENT.

I.

**“Contemplation of Death” Issues Are Fully Reviewable
By This Court.**

Whether a transfer was or was not made in contemplation of death depends upon the facts showing the decedent's motives and the circumstances attending the transfer. In reviewing a Tax Court finding as to contemplation of death, this Court is fully authorized to consider these evidentiary facts and circumstances, and to reverse the Tax Court where they do not support or are inconsistent with the ultimate finding.

Limitations upon the scope of review of such issues by the Courts of Appeals, imposed by a series of Supreme Court decisions culminating in *Dobson v. Comm.*, 321 U. S. 231, 64 S. Ct. 495 (1944), have been removed by 1948 legislation. Sec. 1141(a), Internal Revenue Code, as amended by Sec. 36 of the Act of June 25, 1948 (Public Law 773, 80th Cong., 2nd Sess.), 62 Stat. 646, provides that the Courts of Appeals have jurisdiction to review decisions of the Tax Court “in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.” Such review is thereby made subject to Rule 52(a), Federal Rules of Civil Procedure, as noted in *Estate of Sullivan v. Comm.*, 175 F. (2d) 657 (CA 9, 1949).

In the application of Rule 52(a), two basic principles are established by numerous decisions:

1. This Court may review both the facts as found by the trial court and the evidence upon which those facts are based. If the findings of fact are not supported by substantial evidence, they are clearly erro-

neous within the meaning of Rule 52(a), and this Court is not bound by those findings.

2. This Court is never bound by the inferences and conclusions drawn by the trial court from its findings of fact, but is always free to draw its own inferences and conclusions from the findings and the evidence.

In *Western Union Telegraph Co. v. Bromberg*, 143 F. (2d) 288 (CA 9, 1944), this Court said (p. 290):

“Appellate courts are, however, free to draw inferences and conclusions from findings of fact. See *Kuhn v. Princess Lida of Thurn & Taxis*, 3 Cir., 1941, 119 F. 2d 704, 705, 706.”

In the *Princess Lida* case cited by the Court, it was said (pp. 705-706):

“The Rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings. And so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce. * * * The sufficiency of the evidence to sustain a trial court’s conclusion or finding of an ultimate fact remains appropriate matter for the appellate court’s consideration. * * * Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court’s action. * * * An incorrect conclusion by a trial court qualifies as a ‘clearly erroneous’ finding, for the correction whereof on appeal Rule 52(a) specifically provides.”

Decisions in other circuits to the same effect are:

Bach v. Friden Calculating Machine Co., 155 F. (2d) 361 (CA 6, 1946).

J. S. Tyree, Chemist, Inc. v. Thymo Borine Laboratory, 151 F. (2d) 621 (CA 7, 1945).

Stubbs v. Fulton National Bank of Atlanta, 146 F. (2d) 558 (CA 5, 1945).

In the present case the evidentiary facts are not in conflict or dispute. This Court is not asked to weigh the probity of witnesses, or to choose between contradictory statements. Petitioner's evidence is uncontradicted, and respondent presented no evidence except the estate tax return. Much of this evidence is reflected and summarized in the Tax Court's findings of fact.

Some of the uncontradicted evidence considered material by petitioner was disregarded in the Tax Court's findings and opinion. But the principal error made by the Tax Court was in failing to give effect to many of its own findings of fact. It has drawn inferences and reached conclusions that are completely unsupported by the evidence. In some instances, inferences or conclusions stated in the opinion are directly inconsistent with its own findings of fact.

Recently, in *Wilshire & Western Sandwiches, Inc. v. Comm.*, 175 F. (2d) 718 (CA 9, 1949), reversing a Tax Court memorandum decision, this Court said (p. 721):

“While it may be said that there are features looking both ways as to whether the advancements in this case were loans or stock purchases those sustaining a conclusion that the transaction was a loan greatly preponderate, chief of which as we have stated, is the intent of the parties at the time of entering into the transaction, * * *.”

This Court is equally empowered in this case to review the evidence adduced at the hearing, to draw the proper inferences or conclusions therefrom, and to determine the ultimate fact that the transfers by decedent of his interest in the Hartford Building and Lake Beulah properties were not made in contemplation of death.

II.

The Transfers Were Occasioned By an Affirmative Living Motive Established By Clear and Uncontradicted Evidence.

Near the beginning of its opinion, the Tax Court said:

“Though the crux of the matter is as to what the decedent contemplated, the record is almost, if not quite, barren as to what he actually had in mind.”
(R. 89)

We challenge that description of the record. We believe there is an abundance of evidence of the decedent's state of mind and his intentions. In addition, there is a clear-cut showing of his character and personality, his attitude and actions respecting his property, and like factors, so that the Court can readily and fairly determine how he would react to the situation with which he was faced, and whether, contrary to all other indications, there was any substantial likelihood that his actions in this instance were motivated by contemplation of death.

A.

DECEDENT'S MOTIVE WAS TO REMOVE AN IMPORTANT OBSTACLE TO HIS MARRIAGE.

In 1938 decedent had been a resident of Pasadena, California for about 20 years. He had been a widower since 1932. Several of his children and Mrs. Jenks, his sister and only other close relative, lived in the Chicago area. He continued to spend part of each summer with them at Lake Beulah in southern Wisconsin, but the rest of the time offered increasing prospects of loneliness.

His days were not occupied by the press of business affairs. He devoted all of his time to artistic and cultural pursuits and hobbies, to the affairs of fraternities, to meet-

ings and affairs of French societies and to travel. Attendance at the French club meetings brought him into frequent association with Harriette O'Neil, a French teacher of Pasadena. Their friendship ripened into affection, fortified by their mutual interests.

On May 8, 1938 decedent wrote a letter to each of his children, telling them of his desire to marry Miss O'Neil. (Ex. 20: R. 148-151) His description of her personal appearance and character might have been written by a college youth. It is apparent that entering into this marriage was the most important thing in his mind at that time. In his own words, "I feel, in my inmost heart, that I can not be truly happy again, alone."

However, Miss O'Neil was not yet ready to give her consent.

"* * * she hesitates in our becoming engaged, from a very natural sensitiveness in coming into our long established family where there might be the slightest suggestion of being considered an interloper whose presence would not be entirely welcome to everyone.

"Also, having lived as a bachelor girl, for so many years, she hesitates in giving up that freedom and independence which she has so long enjoyed, * * *. I fear that it may require a great amount of persuasion to induce her to change her mind, in spite of our mutual fondness.

* * * * *

"In view of the conditions, I should devoutly welcome any procedure which might tend to overcome her diffidence. * * *" (R. 148-149)

Decedent feared that even a mere coolness toward Miss O'Neil or the marriage would turn the scales against his suit. He was apparently not then aware that outright objection in one family quarter was in the offing.

Decedent's proposed remarriage met with the hearty approval of his children, who expressed their pleasure to him.

But his sister, Mrs. Jenks, and her husband were immediately opposed to the marriage, and voiced their objections frequently and vigorously. While these objections were made mainly in conversations with two of the children, Hyde and Marietta, the basis of the objection was known to decedent in or before June, 1938.

The objections by Mr. and Mrs. Jenks were provoked by financial matters between decedent and his sister. In June, 1931 decedent was indebted to Mrs. Jenks and gave her his personal promissory note for \$34,000. The first two semi-annual interest payments were made on this note, but decedent made no payments thereafter. In December, 1936 a renewal note was given by decedent to Mrs. Jenks for \$41,650 principal and accrued interest on the prior note. Decedent never made any payment of principal or interest on the 1936 note.

Mr. Jenks was quite different from decedent in character and disposition. He had once been treasurer of a business corporation. For years while he and decedent occupied an office together in Chicago he had busied himself with the management of the family property, while decedent was engaged in desultory architecture practice, designed covers for fraternity magazines and engaged in like non-business activities. Mr. Jenks had also engaged in important negotiations with the lessees of the Michigan Avenue property, and was proud of his success in obtaining \$75,000 from them in connection with an option for the sale of that property. There had been some prior acrimonious correspondence on financial matters between the Jenkses and decedent. It is small wonder that decedent's announcement of his intention to marry Miss O'Neil evoked vigorous objection from Mr. and Mrs. Jenks.

These objections were stated on a number of occasions, first at the Jenks' apartment in Chicago and later at the Lake Beulah summer house. Mr. Jenks was particularly

vehement. He could not understand how decedent, who had been so long negligent of his debt to his sister, could think of taking on the expense of a new wife. He said that he would bring suit on the note to stop the marriage.

Hyde Gillette, decedent's oldest son, recognized that these objections from Mr. and Mrs. Jenks, would be likely to wreck his father's hopes. Miss O'Neil was reluctant to accept decedent's proposal because of a fear of mere coolness by other members of the family. It was likely that she would refuse to enter into a marriage that threatened to result in an outright family estrangement. Even if decedent could succeed in overcoming her objections, the rift between decedent and his sister would remain. Hyde decided that the only solution was to overcome the objections of Mr. and Mrs. Jenks, and he sought to do so. Numerous discussions with Mr. Jenks and with Howard Will, decedent's son-in-law and a practicing attorney at Chicago, resulted in a plan which met with the approval of Mr. and Mrs. Jenks, embracing the transfers here in controversy.

This plan was not made by decedent. Hyde first discussed it with him when he came to Chicago about August 1, 1938. The plan had then been completely formulated but no documents had been drawn pending decedent's approval. Although avoiding the more inflammatory statements of Mr. Jenks, Hyde told his father of Mr. Jenks' attitude toward getting some payment on the notes, pointing out that he had some grounds for feeling as he did. He then described the various arrangements that were proposed to meet these objections.

The evidence of decedent's reaction to the plan was as follows:

Testimony of Hyde Gillette.

“My father's reaction to the plan was that if Howard and I thought it was all right and it met the problems that had arisen, for us to go ahead and draw up the

instruments. We did not discuss it with him much after the instruments were prepared. He left the matter entirely in our hands. I do not recall having any special or extended conferences going over the documents with him, except that I did try to make and felt duty bound to make it perfectly clear to him exactly what they meant and what they covered." (R. 159-160)

"* * * On those visits [week-ends at Lake Beulah in August and September, 1938] I do not recall any specific discussion that I had with my father on the subject of these transfers. We may have had casual conversations. I was not present on any occasion during which these transfers were discussed between Mr. and Mrs. Jenks and my father. It was my purpose in planning the transfers to keep the two families apart and as far as I know I did keep them from discussing the matter, at least in my presence." (R. 161)

"I explained the entire document in general to my father and gave it to him to read. I do not recall explaining the provision for distribution and termination to him specifically. I talked to him about these documents more in terms of the general principles involved, telling him that my one purpose was to permit him to continue a happy life in the way he wished and at the moment that involved making it possible for him to get married with the friendly feeling of all of the family." (R. 164)

Testimony of Howard A. Will.

"I first met Miss O'Neil on the day she signed the prenuptial agreement, September 19, 1938. That agreement had been prepared and given to Mr. Edwin Gillette two days prior thereto when he signed the trusts, and he was to take the agreement with him and discuss it with Miss O'Neil. She came in to Mr. Hyde Gillette's office on Monday, the 19th, along with Mr. Gillette.

"I had discussed the trust instruments with decedent in a general way prior to September 17th when he came to my office to sign them. On that day I went over the

instruments with him, highspotted the important provisions, and we discussed them rather thoroughly at that time." (R. 169-170)

"* * * I can't tell you exactly, but I think it must have been pointed out to Mr. Gillette that the corpus of the Michigan Avenue trust would eventually go to his four children. I don't recall that I explained to Mr. Gillette that if the Michigan Avenue trust was not revoked it provided for complete disposition of the property and he would have to do no more respecting the disposition of that property. I don't believe we got into such detail. Mr. Gillette was not a businessman. He wasn't a man whom you can discuss complicated business matters with very well.

"It was my impression that he had great love for his children. I can't recall that he ever definitely expressed an interest to make provision for their welfare. We had no extended conversation on that subject which would lead me to be able to tell you that that was my impression, he never said that he wanted his property divided after his death among his children. I had no such discussions as that with him." (R. 173)

Testimony of Harriette O'Neil Gillette.

"The subject [antenuptial agreement] was first mentioned to me by Mr. Gillette when he came to Kenilworth, Illinois to spend a week-end when he was visiting there. That was the 17th and 18th of September, 1938. I did not discuss the subject of an antenuptial agreement with him on that occasion. He told me that Hyde and Mr. Will were writing up some papers to that effect. We didn't discuss the agreement at all. * * * The papers which I signed and which, of course, I read and which were explained to me before I signed them mentioned that the Hartford Building and the Michigan Avenue property had been transferred to Hyde Gillette as trustee. I did not discuss any of these transfers with Mr. Gillette prior to the week-end he showed me the proposed antenuptial agreement. * * *

"* * * He never definitely discussed the debt due

Mrs. Jenks. But just before I came East he seemed upset one day and when I asked him what it was he said his sister was annoyed at the idea of his marriage when he wrote the family that he was hoping to get married." (R. 131-132)

The decedent's state of mind was clear. His intended marriage, the objective uppermost in his mind, appeared well on its way to fulfillment. His children had satisfied Miss O'Neil that she would be welcomed into the family. He had been concerned over the objections of Mr. and Mrs. Jenks, but upon his arrival in Chicago about August 1, 1938, his son Hyde discussed their objections in a general way and told him that a solution had been found. The nature of the solution was discussed, but decedent was not a man to be concerned over such property matters. He had long been disinterested in such affairs, and there is nothing in his conduct in August and September, 1938 to indicate that his attitude was any different at that time. He gave only such attention to these affairs as he was forced to do by his son and son-in-law when they attempted to explain the plan and the instruments to him. Except for the discussion with his son about August 1 and the meetings on September 17 and 19, when the documents were signed, he engaged in only casual conversations on the whole subject.

The plan and the documents were presented to him as a whole, and he accepted them on that basis. He was not concerned with details. The plan was a means of removing an obstacle to his marriage. That was all that interested him. If his son and son-in-law "thought it was all right and it met the problems that had arisen" it was entirely satisfactory to him. The only problem confronting him was the threat to his marriage. It is submitted that the evidence clearly shows, without contradiction, that decedent's sole motive in making transfers of the Hartford Building and Lake Beulah properties was to remove an obstacle that

threatened his proposed remarriage, the most important thing in his mind at the time, and to preserve family harmony.

B.

A "LIVING" MOTIVE DISPROVES CONTEMPLATION OF DEATH AS A MATTER OF LAW.

In the leading case of *U. S. v. Wells*, 283 U. S. 102, 51 S. Ct. 446 (1931), the Court said (p. 118):

"If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive."

Such a motive is attested by all the evidence in this case. The transfers were made, at a minimum, to preserve family harmony and, at a maximum, to remove a barrier to the accomplishment of the marriage itself. It is difficult to conceive of a motive more closely related to the continuance of life and dissociated from any thought of death. Corresponding motives in other cases have been regularly held to disprove contemplation of death.

In *Estate of Byram v. Comm.*, 9 TC 1 (1947), decedent, in order to obtain the consent of a Mrs. Evans to marriage, entered into an antenuptial agreement with her. He thereby promised to establish a trust for her benefit. The corpus of this trust was to reduce her rights in his property after his death. Respondent determined that this trust was created in contemplation of death, but the Tax Court held that this was disproved because the trust was a condition to obtaining Mrs. Evans' consent to marriage, even though it contained some provisions effective upon the grantor's death. Respondent has acquiesced in this decision, 1947-2 CB 1, indicating his complete approval of the principle that a transfer to induce marriage is not made in contemplation of death.

In *Lippincott v. Comm.*, 72 F. (2d) 788 (CA 3, 1934), the decedent, ten months before his death, conveyed to his daughter substantially all of his real estate, valued at over \$1,000,000 and consisting mainly of residential property. At that time he had been contemplating a second marriage for at least a year and a half, but the woman in whom he was interested had twice refused to enter into an antenuptial agreement under which she would have accepted specified income payments in lieu of marital rights in his property. He did not want to have the real estate subject to the control and interference of his proposed second wife, and so he conveyed it to his daughter so he could enter into the marriage without the antenuptial agreement. The Board of Tax Appeals sustained a finding that this transfer was made in contemplation of death, relying upon the decedent's age and his poor health, and the fact that two physicians had advised him not to remarry. But the Court of Appeals reversed, saying that the Board seemed to have been so impressed by these factors that it overlooked the testimony showing that the decedent's dominant motive was to put him in a position to remarry without subjecting his real property to the control and interference of his second wife, which was a purpose associated with life and disproved contemplation of death.

See also *Terhune v. Welch*, 39 F. Supp. 430 (DC Mass., 1941), reversed on other grounds, 126 F. (2d) 695 (CA 1, 1942).

In taxing this decedent's transfers, the Tax Court erred both in fact and in law. Decedent was dominated by the thought of remarriage, and what he did was done to make that marriage possible. This is a motive completely unrelated to thoughts of death and disproves that the transfers were made in contemplation of death.

C.

THE PLAN WAS REASONABLY ADAPTED TO SATISFY THE REMARRIAGE MOTIVE, AND DOES NOT SUPPORT ANY OTHER MOTIVE ATTRIBUTABLE TO DECEDENT.

The Tax Court considered that it could disregard the foregoing evidence of decedent's motive because it thought that all parts of the plan were not necessary to his objective, or it could have been accomplished in some different way. The Tax Court seems to have attributed motives to the decedent which are inconsistent with the direct evidence and are wholly out of keeping with his character and conduct of financial affairs over a period of many years. At the hearing, the judge was satisfied that the decedent's character had been fully and accurately depicted (R. 136), and he has summarized the testimony to that effect in his findings (R. 78), but he has given no effect to these findings in his opinion.

Decedent had never been interested in matters of property. Between 1907 and 1920, he had attempted some business investments and had become seriously involved. Thereafter income checks were made payable to his first wife, who handled even the household finances. After her death in 1932, their daughter, Marietta, took over this task until she married and moved to Chicago in 1937. Decedent had long been satisfied to leave both the routine details and the major negotiations in connection with the family properties to his brother-in-law, Mr. Jenks, and later to his son, Hyde, after Hyde finished college and entered the investment banking business in Chicago in 1930. While the termination of the Hartford Building lease in 1933 reduced his income, rentals from the Michigan Avenue property remained adequate for his needs. Since 1931 he had been indebted to his sister, Mrs. Jenks, and had not

even paid interest thereon after the first year. This debt, originally for \$34,000, had been increased to \$41,650 by interest accruals when a renewal note was given in December, 1936, and the total principal and interest amounted to approximately \$45,650 by September, 1938. Decedent had always lived for the moment. He had never displayed financial ability or foresight in handling his affairs. Yet the Tax Court envisions him as suddenly being engaged in a long-range plan for the distribution of his property when in fact his immediate problem in 1938 was the removal of an obstacle to his marriage.

Considering the program in detail, we do not believe it would seem unreasonable to a man of much more financial acumen and foresight than had ever been displayed by decedent. First, as to the Hartford Building, Hyde proposed that decedent convey this property into a trust, with the children as beneficiaries subject to payment of the debt to Mrs. Jenks. In return Hyde, as trustee, would assume payment of this debt. The Tax Court was concerned with disparity between the estimated value of decedent's interest in the Hartford Building and the amount of the debt. Since decedent was to be relieved of the debt, it was clearly in order that the property solely responsible for its payment be in excess of the face amount of the obligation. Decedent owned a half interest in land and a building, old and run down, which was situated partly upon land owned by other parties, and which had earned only a nominal amount in the preceding five years. The joint interests of decedent and his sister were subject to an \$85,000 mortgage. Under those circumstances any estimate of the fair market value of decedent's undivided interest was necessarily theoretical and was a long way from cash in hand.

Decedent was not a man to be interested in frozen property values. The Hartford Building had produced virtually

no income since 1933. He was giving up nothing important to him. He was making possible the thing he most desired at that time, marriage to Miss O'Neil. By parting with this property and subjecting it to the payment of the note to Mrs. Jenks, he would dispose of this debt question once and for all. It had been a subject of intermittent disagreement in the past. At the moment it was an important potential barrier to his marriage. From his standpoint, he was gaining an important objective at a cost which must have been to him nominal or nonexistent.

As to the Lake Beulah property, the circumstances were both personal and financial. Although theoretically decedent was supposed to contribute half of the expenses connected with this property, he had been lax in doing so. This was an obvious source of irritation to Mr. and Mrs. Jenks, the sort of thing that would come to mind when their irritation was already sparked by other causes. There was also an undercurrent of feeling that the new wife might not fit congenially into the family circle at Lake Beulah. Miss O'Neil, already sensitive over intruding into the family circle, promptly sensed this situation, and was as much desirous as was Hyde Gillette of eliminating this possible source of further irritation.

The transfer of decedent's interest in this property to his children, some of whom lived in the Chicago area and were using it much more than he might expect to do, together with the coincident transfer of the expense burden to the children, was a logical and reasonable solution of this problem. This seems so apparent that it is impossible to understand why the Tax Court should disregard this evidence and seek to infer some other motive for this conveyance.

The Tax Court suggests that the decedent might have effected some other sort of settlement with Mrs. Jenks, for instance a mere mortgage on the Hartford Building

and the Lake Beulah property. Without attempting to labor the reasons for each of the details of the entire program, which are shown fully by the testimony (R. 152-154) and summarized to a large extent in the statements in this brief and in the Tax Court's own findings of fact (R. 82-83, 85-86), we submit that any such inquiry has no bearing upon the issue in this case.

First, we are concerned with what was done and why it was done, not what the judge of the Tax Court or any other person might have done in an attempt to solve a similar family problem. We are concerned only with the reasons for the transfers that were made. At most the inquiry should not go beyond the credibility of the reasons shown by the testimony. We believe any tests of credibility and reasonableness are fully satisfied.

As was said in *Wishard v. U. S.*, 143 F. (2d) 704, 708 (CA 7, 1944):

“Nor are we impressed by defendant's argument that decedent could have achieved the desired result by a simpler method * * *.”

Secondly, it is only the motive of the decedent with which we are concerned. The detailed program was formulated by Hyde Gillette, Howard Will, and the latter's associates in his law office. We believe what they had in mind is adequately explained by the testimony, but even if that were not the case there is no basis for attributing whatever they may have had in their minds to the decedent, particularly where such motives are wholly inconsistent with his character and conduct. We repeat that from decedent's standpoint there was only one problem, obstacles to his marriage to Miss O'Neil. The plan evolved at Chicago was presented to him as a means of solving that problem and he accepted it solely on that basis.

D.

THE ANTENUPTIAL AGREEMENT DOES NOT SUPPORT THE TAX COURT'S DECISION.

After substituting unsupported conjecture for clear-cut, direct and inferential evidence of decedent's motive, the Tax Court concludes its opinion by what seems a labored and unrealistic attempt to find contemplation of death in the language of an antenuptial agreement between decedent and Miss O'Neill.

The origin of this agreement and its purposes appear clearly in the evidence. It was suggested by a member of the law firm with which Howard Will was associated. The purpose was two-fold. First, it was thought to be desirable so that the various transfers would not be vulnerable to possible attack by Miss O'Neil after the marriage. The lawyers were merely protecting against a possibility of a claim by her that the transfers were in fraud of her marital rights. Secondly, it was desired to avoid any title complications should the lessees exercise their option to purchase the Michigan Avenue property. They had paid \$75,000 for that option, and Mrs. Jenks and decedent were under bond to repay that amount if good title could not be given when the option was exercised. Howard Will and his law associates, taking a realistic view, saw the potentiality of an estrangement when the time came to convey the Michigan Avenue property, and did not want decedent's wife to be in a position to block that transaction. They protected against that possibility.

Under Illinois law, dower and homestead rights attach in inchoate form to real estate immediately upon marriage. The owner of real estate can not convey good title unless his spouse joins in the conveyance. It seems apparent that the provision for waiver of dower and homestead

rights in the antenuptial agreement has not the slightest inference of contemplation of death. With the lessees of the Michigan Avenue property obligated either to erect an office building thereon or deposit \$100,000 in securities as a guaranty fund by March 1, 1939, the problem of title protection was imminent.

The Tax Court seizes upon the terms "wife, or widow" and other provisions of the agreement as indicating that decedent was contemplating death. These were the words and provisions of the attorneys, not of the decedent. The antenuptial agreement was delivered to decedent on Saturday, September 17, 1938, when he executed the trust agreements covering the Hartford Building and Michigan Avenue properties and the conveyance of the Lake Beulah property. He was to pass it on to Miss O'Neil so that she could examine it over the week-end. As shown by her testimony, previously quoted herein, decedent merely mentioned the agreement and showed it to her. She did not examine it in detail until the meeting on September 19, when she executed it. The antenuptial agreement was an incidental document, and so treated by everyone involved. The record does not support the Tax Court's exaltation of this instrument.

The Tax Court also seeks to find support for its decision in the fact that the children were not provided for in the decedent's will made on April 24, 1939. It is generally considered that the execution of a will contemporaneously with inter vivos transfers supports an inference that the decedent had some contemplation of death at the time of the transfers. The execution of a will over seven months after transfers were made and as a wholly independent transaction would seem to create an inference that the testator was not thinking of death at the time of the transfers.

The testimony is that decedent did not discuss the making of his will with the other members of his family in 1938 or thereafter. Even his wife did not know of it until after his death. Under these circumstances it seems particularly difficult to attribute any adverse significance to this decedent's will.

III.

Absence of Contemplation of Death Is Further Established By Decedent's Activities, Health and State of Mind.

"Contemplation of death" is not a statutory abstraction to be applied by the methods of metaphysics. It requires a consideration of the actual facts and circumstances that motivated a living person and influenced his actions. In noting that contemplation of death was not confined to imminent death, the Tax Court passed over a more basic requirement. As stated in *U.S. v. Wells*, 283 US 102, 117, 118 (1931):

"Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition."

"* * * The words 'in contemplation of death' means that the thought of death is the impelling cause of the transfer, * * *"

Again in *Allen v. Trust Co. of Georgia*, 326 US 630, 66 S. Ct. 389 the Court said (p. 635):

"The transfer is made in contemplation of death if the thought of death is the 'impelling cause of the transfer.'"

In short, before there can be "contemplation of death", there must be a thought of death present in the decedent's mind, of such compelling force that it causes him to do things that he would not otherwise do. It follows that a determination by respondent that a transfer was made in

contemplation of death can be disproved by proof that such thoughts, if they existed at all, were not of serious concern to the decedent. Such proof may be found in the state of his health, his conduct, and his mental attitude.

It is established beyond question that this decedent, in 1938 and continuously up to a few days before his death, was in excellent health, and that he engaged in normal and vigorous activities. During the summers of 1938, 1939 and 1940, he went swimming almost daily during his visits to Lake Beulah. In 1939 and 1940 he built trails, sawed tree limbs and did other work around his cabin in Colorado, at an altitude of 9,000 feet. Within ten days before his death he stood and sang in a two-hour concert with his glee club. He never had an illness more serious than a common cold or other minor ailment, and visited physicians infrequently. Government counsel admitted that decedent was in good health (R. 148), and the Tax Court found that he was in good mental and physical condition. (R. 87-88, 94)

Decedent's conduct of his financial affairs gives further proof that he was not the sort of man to be strongly influenced by thoughts of death, particularly since, in view of his good health, such thoughts were bound to be remote. He had never previously shown any foresight in connection with his property. He had never been concerned with preserving or enhancing it. That he should have suddenly become interested in the devolution of property after his death, as the Tax Court seems to infer, is completely out of keeping with his character which, as described by several witnesses, had been consistent for a period of over 20 years.

There is something incongruous in thoughts of death being an important factor in the mind of a man who is about to be married and whose own words at the time were "Our spirits seem to be equally young in our ideals and

future outlook.” It may well be possible for a man at such a time to be concerned with devolution of property and other remote and intricate business details, but it is impossible to conceive of this decedent as being such a man. Such planning would have been completely inconsistent with his character and modes of thoughts.

It was only by blinding itself to facts of this nature, which appear at some length in the findings of fact but are passed over with little or no mention in the opinion, that the Tax Court could say that the record in this case is “barren” as to the decedent’s state of mind.

In *Wishard v. U. S.*, 143 F. (2d) 704 (CA 7, 1944), the Court said (p. 708) :

“Everything decedent did was consistent with the idea that he expected to live and be active for many years. His health, energy, vigor and activity militate against considering this transfer as one made in contemplation of death.”

In *Estate of Johnson*, 10 TC 680 (1948), Acq. 1948 IRB 17, the Tax Court said (pp. 688-689) :

“The circumstances which tend to indicate that decedent’s motives were associated with life are as follows: (a) Decedent’s health at or before the time of the transfers was good; (b) decedent’s nature and disposition were cheerful, sanguine, and optimistic; (c) there was an interval of four years between the time of the transfers and the time of decedent’s death; (d) there was at the time of the transfers no testamentary scheme on the part of decedent, decedent’s only will (so far as the record discloses) having been made four months after the transfers; * * *”

It is difficult to reconcile the Tax Court’s opinion in that case with its opinion in the present case.

The Tax Court’s apparent disregard of this evidence showing that decedent was not concerned with thoughts of

his death in 1938 and was not the sort of person who would have been moved to make property transfers by such thoughts, is a further ground for reversal.

IV.

The Tax Court Erroneously Relied Upon An Inapplicable Presumption.

In addition to substituting conjecture for evidence, the Tax Court appears to have relied heavily upon a presumption of correctness attending the respondent's determination. It seems to match this presumption against the evidence and to consider that the presumption has the greater weight. Thus, at the beginning of its opinion, the Tax Court said:

“It is not necessary to cite cases to support the statement that the question is one of fact on all of the evidence, or that the petitioner, the Commissioner having determined that the transfers were made in contemplation of death, has the burden of proof to demonstrate the contrary.

“Upon careful examination of the facts which we have found in detail, we have come to the conclusion that the petitioner has not met the burden imposed. * * * What little [evidence] does appear does not, in our opinion, by any means suffice to overcome the presumption of correctness of the Commissioner's determination.” (R. 89-90)

And at the conclusion of its opinion, the Tax Court said:

“* * * We conclude and hold that the petitioner has failed to show that the transfers of the Hartford and Lake Beulah properties were not, as determined by the Commissioner, in contemplation of death within the meaning of Section 811(c) of the Internal Revenue Code.” (R. 95)

The presumption relied upon by the Tax Court is not evidence and is not to be weighed against evidence. It merely imposes an obligation upon the petitioner to put in some proof on the issue. When evidence is introduced the presumption vanishes.

These principles were stated, clearly and emphatically, by this Court in *Hemphill Schools, Inc. v. Comm.*, 137 F. (2d) 961 (CA 9, 1943). The Board of Tax Appeals, as in the present case, had said:

“The evidence does not overcome the determination of respondent.”

Reversing the Board, this Court said (pp. 963-964):

“The Board’s holding * * * appears to have been based upon respondent’s determination that petitioner’s gains and profits were permitted to accumulate beyond the reasonable needs of its business. Whether that determination was correct or incorrect was the principal, if not the sole, issue in the case. The burden of proving it incorrect rested on petitioner. Thus, if no evidence had been produced, the Board would have had to accept the determination; for, until evidence was produced, the determination was presumed to be correct.

“Evidence *was* produced. Some of the evidence produced by petitioner tended to prove that its gains and profits were not permitted to accumulate beyond the reasonable needs of its business. *Evidence having been so produced, the presumption ceased, and thenceforth the issue depended ‘wholly upon the evidence.’ It thus became the duty of the Board to find from the evidence, and from it alone, whether petitioner’s gains and profits were permitted to accumulate beyond the reasonable needs of its business. No such finding was made. Instead, the Board treated the presumption (which no longer existed) as if it were evidence, weighed it against petitioner’s evidence and concluded that petitioner’s evidence did not ‘overcome it.’* [Emphasis supplied]

Other circuits are fully in accord. Thus, in *Hughes v. Comm.*, 153 F. (2d) 712 (CA 5, 1946), the Court said (pp. 713-715):

“On petition for redetermination the Tax Court, acting by one judge, leaned heavily upon the presumption of correctness of the Commissioner’s action, and reasoned away the uncontradicted testimony to the contrary by assuming that there might have been a sale or a gift by Mrs. Hughes to her husband * * *. The final conclusion that the burden of overturning the action of the Commissioner is not sustained we think is not according to law.

* * * * *

“Here the mere production of the stock certificate indicates Mrs. Hughes to be the owner, and if no more were shown it would prove the Commissioner was wrong.

* * * * *

“The presumption in its [Commissioner’s determination] favor can not lawfully be given prevalence over the sworn testimony. * * *,”

In the present case, the Tax Court has erred in failing to decide solely upon the evidence before it. It has attempted to “reason away” the uncontradicted testimony by unsupported assumptions and reliance upon a presumption which became non-existent shortly after the commencement of the hearing.

Sec. 811(c), previously quoted, provides that a transfer made within two years prior to death shall, unless shown to the contrary, be deemed to have been made in contemplation of death. This presumption is plainly inapplicable, since the Gillette transfers were made over five years before the date of death.

Under these circumstances a determination by the Commissioner that contemplation of death existed must have real factual support. The Commissioner’s need of a pre-

sumption of correctness may be justified on grounds of administrative convenience, but there should be no suggestion by any court that this is a grant of untrammelled discretion to one of the adversaries in a tax controversy. The Tax Court might better have called upon respondent for evidence in support of his determination, or called attention to the lack of such evidence, than to have invested the bare determination with a robe of inviolability.

Conclusion.

The record in this case contains extensive and substantial evidence. The Tax Court made extensive findings of fact covering much of this evidence. But in the writing of its opinion, much of this evidence is brushed aside or even disregarded. Instead the Tax Court goes afield to support the respondent's determination, erroneously weighing an initial presumption of the correctness of this determination against the evidence, and erroneously substituting assumption and conjecture not supported by the evidence and in some instances directly inconsistent with the evidence.

The evidence itself—upon which the case should be decided—shows plainly and without contradiction that decedent was dominated by a motive wholly inconsistent with contemplation of death. His major concern in the summer and fall of 1938 was to marry Harriette O'Neil. There was an obstacle to this marriage. Decedent's son, with the assistance of his son-in-law, proposed a plan to overcome this obstacle. The program was suggested to decedent as a means of removing the obstacle to his marriage, and he accepted it on that basis. The transfers of his interest in the Hartford Building and Lake Beulah properties were important elements of that program. Having been made by decedent solely for the purpose of making

possible the desired marriage, they were not made in contemplation of death.

Additional evidence of the decedent's health, activities, mode of life, interests and hobbies and, on the other hand, his lack of interest in property matters, particularly a lack of foresight in that connection, gives no indication that thoughts of death were on his mind and any such thoughts would not be likely to influence his actions. Supplemented by the fact that he was about to enter into marriage, a time particularly dissociated from thoughts of death, there was abundant evidence that contemplation of death was not the "impelling cause" of his action in 1938.

It is submitted that the decision of the Tax Court should be reversed and that the transfers by decedent of the Hartford Building and Lake Beulah properties should be held not to have been made in contemplation of death.

Respectfully submitted,

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No. 12379

**In the United States Court of Appeals
for the Ninth Circuit**

**ESTATE OF EDWIN F. GILLETTE, HARRIETTE O'NEIL GIL-
LETTE, EXECUTRIX, PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

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FILED

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CLERK

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OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 72-95) are not officially reported.

JURISDICTION

The Commissioner determined a deficiency in estate tax against the estate of Edwin F. Gillette, deceased, and on June 20, 1947, mailed notice of the deficiency to Harriette O'Neil Gillette as executrix of his estate. (R. 9-13.) A petition for redetermination of the deficiency under the provisions of Section 871(a) of the Internal Revenue Code (R. 4-13) was filed on August 28, 1947 (R. 13), within the permitted ninety-day period.

A hearing was held on June 10 and 11, 1948 (R. 2), and the decision of the Tax Court, deciding that there is a deficiency in estate tax in the amount of \$37,933.11, was entered April 27, 1949 (R. 103). A petition for review by this Court (R. 104-106) was filed on July 22, 1949 (R. 106), and properly invoked the jurisdiction of the Court under Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether taxpayer sustained her burden of proving that the decedent's 1938 transfers of the Hartford and Lake Beulah properties were not made in contemplation of death within the meaning of Section 811 (c) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in con-

temptation of death within the meaning of this subchapter;

* * * *

(26 U.S.C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

* * * *

STATEMENT

The facts found by the Tax Court (R. 73-89), taken from a stipulation of facts and evidence adduced at the hearing (R. 72-73), are as follows:

The decedent, Edwin F. Gillette, was born on October 19, 1863, and died on December 10, 1943, a resident of

Pasadena, California. He left surviving him his widow, Harriette O'Neil Gillette; two sons, Hyde and Edwin; and two daughters, Helen Gillette and Marietta Will. (R. 73.)

The decedent's estate was administered in the Superior Court of the State of California in and for the County of Los Angeles. The decedent's widow is the executrix of the estate. (R. 73.)

The decedent was not a man of business. Though well educated, including a course in architecture, he followed neither that profession nor any other for a livelihood. He was interested in studying and composing poetry in French and in doing beautiful cabinet work in a workshop. He interested himself in his fraternities and the publication of one, in a hunt club, a choral society, a tennis and swimming club. He drove a car a great deal and was interested in photography. He devoted all of his time to the above pursuits. (R. 78.)

Since 1917 the decedent had resided in Pasadena, California, and lived upon the income from property inherited from his father. He and his sister, Mrs. William S. Jenks, had inherited three pieces of real estate in equal shares—a 14-story office building in the Loop District in Chicago (hereinafter called the "Hartford Building"); the "Michigan Avenue property" on South Michigan Avenue in Chicago; and a summer home at Lake Beulah, Wisconsin (hereinafter referred to as the "Lake Beulah property"). (R. 78.)

The Hartford Building was in the hands of building managers, employed by the decedent's son Hyde, under power of attorney from his father and aunt, Mrs. Jenks. The building was subject to a mortgage of \$85,000. From December, 1933, to September, 1938, the building was in a run-down condition and had produced no net income for its owners, except \$310 to each in January, 1938, and \$593.78 to each in August, 1938. Decedent's half interest was worth about \$120,000. (R. 79.)

The Michigan Avenue property was in 1931 subject to a 198-year lease, producing \$12,000 a year, and an option held by the lessees to sell to the lessee for \$375,000, \$75,000 of which had been paid. To assure delivery of and good title to the property under the option the Jenks family and decedent and his then wife had in 1931 given a bond for \$75,000 secured by a trust deed on the property. The lessee-optionee was required either to erect an office building or put up as a guaranty for such erection \$100,000 in securities by March 1, 1939. (R. 78-79.)

The decedent estimated that his interest in the Hartford Building was worth about \$175,000 above the mortgage and that his interest in the Michigan Avenue property was worth about \$100,000. His interest in the Lake Beulah property was worth about \$10,000. (R. 79.)

The decedent also owned his home in Pasadena, California, estimated by him to be worth \$15,000; about 333 acres of mountain land in Estes Park, Colorado, estimated by him to have a value of \$16,000; a mining property in Colorado, estimated by him to be worth \$5,000; and securities and other personal property which he estimated at \$10,000. (R. 79.)

On September 17, 1938, the decedent conveyed his interest in the Hartford Building to his son Hyde in trust for decedent's four children; conveyed his interest in the Michigan Avenue property to Hyde as trustee; and conveyed his interest in the Lake Beulah property by warranty deed to his four children. At the time the decedent was a widower but was contemplating marriage with Harriette Marie O'Neil. On September 19, 1938, they entered into an ante-nuptial agreement in writing. (R. 73-74.)

In material part, the trust deed covering the Hartford Building, under which the decedent's son Hyde was trustee, provided that decedent transferred his half

interest in the Hartford Building in consideration of the trustee's assumption of and agreement to pay, but only from the assets of the trust, decedent's indebtedness on promissory notes to his sister Mrs. William S. Jenks in the amount of \$40,000 and \$4,000 accrued unpaid interest, and to pay future interest; that trust income should be paid equally to decedent's four children for life and, under the will of any child dying, to the descendants or spouse of any such child; that the trust should terminate upon the death of the last survivor of the four children and Mrs. William S. Jenks, but after the death of Mrs. William S. Jenks could be terminated by written instrument signed by a majority of the children; that upon termination of the trust the trust principal, including any accumulated income, should be distributed to the four children, if living, and to the issue of any deceased child or to his appointee by will, otherwise equally to the survivors among the four children and per stirpes to issue of any other deceased child; and that a majority of the four children or the survivors thereof could by writing alter, modify, or change the trust in any respect, but not after the death of one of them so as materially to affect the rights of those substituted for a deceased child. (R. 74.)

The note referred to in the trust instrument as for \$40,000 and accrued interest was, in fact, for \$41,560. It was a renewal on December 23, 1936, of a note for \$34,000 given by decedent to his sister in 1931. Decedent paid the interest in 1931 and 1932 but never thereafter. (R. 74-75.)

On September 17, 1938, the decedent's son Hyde wrote decedent a letter stating, in material part, that he as trustee assumed and agreed to pay, but only out of the trust assets, the indebtedness to Mrs. Jenks, and would save decedent harmless with reference thereto. Since that time the trustee has paid the interest to Mrs.

Jenks from that trust, it being unnecessary to call upon the Michigan Avenue trust for any interest (under the provision hereinafter set forth). The record does not disclose whether Mrs. Jenks released the decedent from the indebtedness on the note. (R. 75.)

The trust instrument conveying the Michigan Avenue property to the decedent's son Hyde as trustee provided in material part as follows: That trust income should be distributed to the settlor, the decedent, except that Mrs. William S. Jenks should during her life receive \$1,000 a year or such part thereof necessary to pay her \$1,000 a year whenever the trust covering the Hartford Building did not pay her that much interest on the \$40,000 indebtedness; that after the settlor's death income should go to assure Mrs. William S. Jenks \$1,000 a year either from the Hartford Building trust or the Michigan Avenue property trust and, if settlor should marry and leave surviving him a widow who was living with him at his death, that such widow should be paid \$1,500 per year for life; that other income should be paid for life to decedent's four children or to their descendants or spouses as appointed by their wills, or in case of no such appointment, *per stirpes* to their surviving issue, or, if none, to surviving issue of the decedent; that the trust should terminate on the death of the last survivor of the four children, Mrs. William S. Jenks, and settlor's widow, or by a written instrument signed by a majority of the children; that upon termination of the trust, principal and accumulated income should be distributed equally to the four children if living, but if any were dead to his issue or appointees by will; that after the death of the settlor, his widow, and Mrs. William S. Jenks, the trust could be altered, changed, or modified in any respect by a written instrument signed by a majority of the settlor's living children, but not to affect materially the rights of those substituted for a deceased

child; and that the trust could be terminated, altered, or modified in any respect at any time by the settlor, in writing. (R. 75-76.)

So far as material here, the ante-nuptial agreement between decedent and Harriette Marie O'Neil provided as follows: That the parties contemplated marriage; that Harriette O'Neil "has been fully informed as to what her statutory rights would be" as wife or widow; that decedent had recently conveyed his half interest in the Hartford Building in trust for his four children, subject to a mortgage of \$85,000 against the whole property; that after deducting one-half of the \$85,000 it is estimated that the half interest is worth \$175,000; that decedent was indebted to his sister, Mrs. William S. Jenks, on promissory notes totalling \$40,000, with accrued unpaid interest of \$4,000, and that the trustee has assumed that debt, from which it is contemplated the sister will release him, the decedent; that he has recently conveyed his one-half interest in the Michigan Avenue property "in trust for the ultimate benefit of his four children;" that his half interest is estimated to be worth not more than \$100,000; that he is to receive for life the net income, which was \$6,000 under a lease, subject to possible payment of \$1,000 a year to Mrs. William S. Jenks; that he has recently conveyed outright to his four children his half interest, estimated to be worth \$10,000, in the Lake Beulah property; that he owns a residence in Pasadena, California, 333 acres of mountain property, a mining property in Colorado, and securities and personal property, estimated at \$10,000; that he intends to provide \$1,500 a year, from income of the Michigan Avenue property for his wife for her life after his death; that it is the intent of Harriette O'Neil to waive, relinquish, and bar her dower interest as wife or widow and homestead rights in decedent's property owned or to be owned

by him; therefore, that in consideration of the payment to her of the \$1,500 per year for her life after decedent's death, and in consideration of marriage, Harriette O'Neil relinquishes, bars, and surrenders all her rights because of marriage, both dower and homestead, in the property owned or to be owned by the decedent, that she will join him, his heirs, administrators, executors, or assigns in any conveyances thereof, and he, his heirs, executors, administrators, or assigns may convey such properties without her joining. (R. 76-78.)

In 1938 decedent's sister, Mrs. Jenks, her husband, decedent's son, Hyde Gillette, and decedent's daughter, Marietta Will, lived in or near Chicago. Hyde, now aged 42, was an investment banker in Chicago. Marietta's husband, Howard Will, now aged 49, had been an attorney in Chicago since about 1924. The Gillette and Jenks families had a close friendly relationship. Mrs. Jenks was very fond of her brother's children. She had no other nieces or nephews. She and decedent were very devoted to each other. (R. 79-80.)

On May 8, 1938, the decedent wrote his son, Hyde, with an identical letter to each of the other children, in effect that he had been urging one Harriette O'Neil to marry him, but that she hesitated to come into the family and to give up the freedom which as a bachelor girl she had long enjoyed; that they were lovers "seeking such happiness as may be found at this late date"; that he would welcome any procedure tending to overcome her diffidence in meeting the members of the family; and that he hoped the letter would have favorable consideration. Harriette O'Neil was then 41 years of age and the decedent 75. (R. 80.)

The decedent's children, upon learning of the suggested marriage, were pleased at the prospect, except that the record does not indicate the attitude of Helen. (R. 80.)

Hyde first discussed the proposed marriage with the Jenks family in May, 1938, shortly after he received his father's letter. Mr. Jenks, who largely looked after his wife's interests, took a different view from that of the children, and of his wife to a lesser degree. He did most of the talking on the subject, and at times was loud and bitter on the subject. It was discussed by Hyde and the Jenks family several times, both in Chicago during the summer and at Lake Beulah in August and September. Howard Will joined in the later discussions. The Jenks family was unhappy at the idea. They did not see how decedent could afford to marry, and pointed out that he was receiving only \$6,000 per annum from his interest in the Michigan Avenue property; that he was indebted to Mrs. Jenks on a note, upon which he was not paying the interest; that they felt that he should not take on additional obligations; that marriage involved additional expense and that decedent might possibly encumber his sister's interest in the Hartford Building and Michigan Avenue properties; and that, if the optionees on the Michigan Avenue property elected to purchase, it might not be possible to give clear title. Jenks pointed out that this might be ruinous for the two families because the Michigan Avenue property represented their only remaining source of income. Jenks at one time said that he would see that decedent was sued for collection of the notes before he incurred further obligations, or he would stop the marriage. (R. 80-81.)

Mr. and Mrs. Jenks did not insist that the two trusts contain provisions relative to the distribution of corpus to the children at termination. Their primary interest was to get the note secured. Will never explained to them the complete distribution of the trust corpus. (R. 81.)

As to the Lake Beulah property, Jenks and his wife also indicated that having a new head of the family

brought to Lake Beulah would result in complications. Decedent had not been paying promptly his share of the expenses of that property. It was used by both families, including grand children, as a summer home. (R. 81-82.)

Hyde Gillette felt that he would like to do anything he could to prevent a rift in the family and resolved to try to do something to prevent Jenks from expressing his strong feelings about the unpaid note. He approached Jenks, pointed out the feeling that was developing between decedent and his sister, and asked if he could not do something to keep harmony. There had been acrimonious exchange of letters in the past, which had "blown over," and Hyde knew that decedent would become excited and extremely headstrong if Jenks repeated his statement to decedent. Hyde counselled Howard Will and his law firm, and it was felt that the decedent's indebtedness to Mrs. Jenks might be secured by his interest in the Hartford Building. After further discussion it was decided that since Hyde was handling the Hartford Building he might as well be appointed as trustee and the Hartford Building transferred in trust to him. Jenks was adamant on Mrs. Jenks receiving some interest and Hyde decided that he would see that she was guaranteed at least \$1,000 per year out of the approximately \$2,000 interest due her, so he proposed that part of the decedent's \$6,000 income from the Michigan Avenue property assure Mrs. Jenks of the \$1,000. He felt that a trusteeship in him, over the Michigan Avenue property, was a logical vehicle to assure the payment of the \$1,000 to Mrs. Jenks, if the Hartford trust was unable to do so. The Michigan Avenue trust was also created to assure the delivery of title, in case of exercise of the option, as Jenks suggested that an uncooperative wife of the decedent might hamper the transfer under the option and cause default. Such a trust would also make it more difficult

for decedent to encumber his sister's interest. (R. 82-83.)

Howard A. Will prepared the trusts. (R. 83.)

Hyde did not desire to engage in correspondence on the subject and wanted to handle it orally with his father. He did not wish to create friction between his father and Jenks. His father was never told about Jenks' statement about suit on the notes, but the decedent did know that the Jenks family had obligations to the marriage in connection with the indebtedness on the note. Hyde and Will explained, in general, to Jenks and wife what they contemplated doing. (R. 83.)

On June 23, 1938, Miss Harriette O'Neil came through Chicago on the way to visit farther east. She had lunch with Hyde Gillette, whom she then met for the first time, and left that evening for the east. The decedent had previously told her that his family was pleased with the idea of the proposed marriage to her, but that Jenks and wife were not pleased, that his sister was annoyed, and that he was behind on interest but the pressure came when possible marriage came up. He had said nothing to her about a pre-nuptial agreement. She met Hyde at decedent's suggestion because she wished to meet all his family before the marriage. She spent about an hour and a half with Hyde. He seemed very friendly about the marriage; told her that the Jenks family was not pleased from a financial point of view; mentioned a large debt, and that the Jenks family felt that his father could not take on extra expense, that the upkeep of the Lake Beulah property was a burden, that possibly his father and his wife would not be interested in coming to Lake Beulah regularly; and that perhaps some arrangement could be made for them to come as guests once in a while. She told him she so preferred, rather than to continue the upkeep and joint ownership and use. She was not concerned, because

she thought probably some arrangement could be worked out to satisfy the Jenks family. Ante-nuptial agreement was not mentioned. Hyde told her that he and Mr. Will were working on a plan which they thought might take care of the matter and not jeopardize his father's interest. He mentioned the plan in general terms. It had not at that time been completely formulated. It was not until later, after talks with Jenks and his wife, that Hyde and Will arrived at a definite plan. It was entirely completed before the decedent came east, but no documents had been drawn because Hyde wished to discuss the matter with his father and see what he thought of it. (R. 83-84.)

About August 1, 1938, decedent arrived in Chicago. He and Hyde had lunch together that day. Hyde told him in general terms of Jenks' attitude toward getting some payment on the notes, and then suggested the arrangements that had been decided upon. He did not wish to make his father angry and did not tell his father what Jenks had said about suit on the note. Decedent's reaction to the plan was that if Howard (Will) and Hyde "thought it was all right and it met the problems that had arisen, for us to go ahead and draw the instruments." The matter was discussed practically not at all with the decedent after the instruments were prepared. Hyde gave the instruments to his father to read and explained them in general, not in detail but more in terms of the general principles involved. He told his father that his one purpose was to permit him to continue a happy life and to get married with the friendly feeling of all the family, which could be accomplished by some arrangement definitely to take care of the interest on the note. Decedent left the matter entirely in the hands of Hyde and Howard. Hyde tried to make it perfectly clear to his father what the document meant and covered, but had no special conference

with him. Hyde originated the idea of transferring the Lake Beulah property, and the idea of providing \$1,500 per year for the new wife, in order to make the arrangement acceptable to his father. There was no discussion of a will. It was Hyde's purpose to keep the Jenks family and his father apart and they never discussed the matter in Hyde's presence. Hyde knew what he wished to accomplish. He does not remember ever showing the documents to Jenks or his wife. He told Mrs. Jenks in a general way what they contained. Jenks did not suggest any method of getting interest paid on the note. Hyde took it upon himself to find a way. He showed his father and Mrs. Jenks that the Hartford property was gradually improving and he thought that some day the earnings would also improve. Though the trust on the Michigan Avenue property was revocable, Hyde did not then feel that his father would revoke it, thinking his father was not sufficiently interested in business details to take the trouble to make that step. (R. 84-86.)

Howard Will was never asked by the decedent to prepare the transfers. During July and August, 1938, Hyde and he discussed the matter. Will devoted several days to drafting the instruments. One of the senior members of his firm, who collaborated with him, was familiar with federal tax matters. That member of the firm suggested the pre-nuptial agreement. Will discussed the plan with Hyde from as early as June, 1938. (R. 86.)

On September 17, 1938, the decedent signed the trust agreements. Will went over them with decedent, "high spotted the documents, the important provisions" and discussed them "rather thoroughly" with him. Will gave decedent the ante-nuptial agreement, suggesting that he take it with him and discuss it with Miss O'Neil,

and it was arranged for her to come in on Monday the 19th to sign or discuss it. She was at Kenilworth, Illinois, and decedent went there to spend the week-end, the 17th and 18th of September. He did not discuss the ante-nuptial agreement with her but told her that Hyde and Will were writing up some papers to that effect. She came in on Monday, September 19th, to Hyde's office. She, decedent, Hyde and Will were present. She then met Will for the first time. He suggested that she should have a lawyer to look over the papers, but she felt it to be unnecessary. She read the ante-nuptial agreement, which mentioned the trust agreements, and they were explained to her "more or less" before she signed. She realized, when she read the agreement, that the transfers had previously been made. (R. 86-87.)

Decedent and Harriette O'Neil were married October 29, 1938, and lived together until his death. On April 24, 1939, the decedent executed his will, giving, devising, and bequeathing all of his property to his wife. His children were not mentioned in the will. He did not discuss it with his wife and she did not at the time know that he had executed it. (R. 87.)

The lessees of the Michigan Avenue property exercised their option thereon in the spring of 1939 and paid for the property \$300,000, one-half of which went to Mrs. Jenks, who requested Hyde to invest it in securities for her. She still owns them. (R. 88.)

On September 3, 1940, the decedent amended the trust of the Michigan Avenue property to provide a minimum income to him of \$6,000 a year (if necessary, to be paid from principal) except any payment necessary to Mrs. William S. Jenks. (R. 88.)

In December, 1940, Mrs. Jenks created a trust, drawn largely by Will. Therein she transferred her half interest in the Hartford property to Hyde Gillette in trust to pay the income to her four nieces and nephews,

or their issue, for life, the corpus to go to them on termination. (R. 88.)

Decedent was not seriously ill at any time prior to his last illness, except for colds, and was not attended by a physician until the day he died, when his wife, against his will, called a doctor. He had for two or three weeks complained of not feeling exactly as usual. He stayed in bed two days before his death. His physician, about ten o'clock in the morning, told his wife his kidneys were not functioning correctly, and for him to keep warm and stay in bed. He died about two o'clock that day. The certificate of death gives coronary thrombosis due to kidney infection, as the cause of death. (R. 87-88.)

The decedent's estate tax return was filed on or about March 3, 1945, with the Collector at Chicago, showing a total estate tax payable of \$45,064.39, which was paid as follows (R. 88):

9-27-44	\$12,158.49
3-10-45	32,905.90

The return did not include as a part of the decedent's gross estate the ownership of any interest in the Hartford Building or the Lake Beulah property. (R. 88.) In his deficiency notice the Commissioner determined that the two properties had been transferred by the decedent in contemplation of death (R. 12) and included the properties in the decedent's gross estate (R. 88-89).

The Tax Court affirmed the Commissioner's conclusion that decedent's transfers of the two properties had been made in contemplation of death within the meaning of Section 811(c) of the Internal Revenue Code. (R. 89-95.)

SUMMARY OF ARGUMENT

Taxpayer had the burden of proving that the decedent's outright transfer of his interest in the Lake Beulah property and his transfer in trust of his interest in the Hartford Building property were not made in

contemplation of death—that is, that the decedent’s dominant motive in making the transfers was one associated with life rather than with death. The reason given by taxpayer for the transfers is not substantiated by evidence. Accordingly, taxpayer failed to meet her burden of proof and for that reason alone the decision of the Tax Court should be affirmed. Moreover, there is affirmative evidence indicating that the transfers were motivated by a desire on the decedent’s part to prevent his contemplated remarriage from affecting the devolution of these properties to his children and that the transfers were intended as substitutes for testamentary dispositions to his children, with the result that the transfers were made in contemplation of death.

ARGUMENT

Taxpayer Has Not Met Her Burden of Proving That the Decedent’s Transfers of the Hartford Building and Lake Beulah Properties Were Not Made in Contemplation of Death

In his deficiency notice the Commissioner determined that the decedent’s transfers of the Hartford Building and Lake Beulah properties were made in contemplation of death. (R. 12.) That determination is presumptively correct and the executrix of the decedent’s estate (hereinafter referred to as the taxpayer) had the burden of proving it to be wrong. *City Bank Co. v. McGowan*, 323 U. S. 594, 599; *Pearce v. Commissioner*, 315 U. S. 543; *Welch v. Helvering*, 290 U. S. 111, 115. The Tax Court concluded that taxpayer had not met her burden of proof. (R. 89-90, 95.) Thus, the only question before this Court is whether that conclusion of the Tax Court is “clearly erroneous”.¹

¹ This Court has recognized that the Tax Court’s finding that a transfer was made in contemplation of death is primarily a finding of fact (*Sullivan’s Estate v. Commissioner*, 175 F. 2d 657; *Koch v. Commissioner*, 146 F. 2d 259), to which Rule 52(a) of the

At the outset it should be noted that, as the Tax Court stated (R. 89), the evidence is “in a peculiar condition.” The record certainly justifies the Tax Court’s statement (R. 89-90) that—

Though the crux of the matter is as to what the decedent contemplated, the record is almost, if not quite, barren as to what he actually had in mind. A great deal of evidence appears as to what his son and son-in-law intended in drawing the instruments which the decedent signed; also to show the intention of Jenks and to a lesser degree of his wife. But remarkably little gives any real view of the state of mind of the decedent, as to what he did or did not contemplate, in making the transfers involved.

* * *

Taxpayer nevertheless contends that the record contains clear and uncontradicted evidence that the decedent’s transfers were not made in contemplation of death. (Br. 22.)

Contrary to taxpayer’s contention (Br. 37-40), it is of no importance here that the evidence of the decedent’s activities, health and mental attitude shows that he had no thought of *imminent* death in mind when he made the transfers of the Hartford Building and Lake Beulah property. A transfer “in contemplation of death” within the meaning of Section 811(c) of the Code, *supra*, need not be one made in contemplation of imminent death; since the object of the statute is to reach substitutes for testamentary dispositions and thus prevent evasion of the estate tax, a transfer is made in contemplation of death if the decedent contemplated death in the sense that his dominant motive in making

Federal Rules of Civil Procedure is now applicable (*Sullivan’s Estate v. Commissioner, supra.*). Under Rule 52(a) the Court may reverse a finding of the Tax Court only if the finding is “clearly erroneous”. *Kohl v. Commissioner*, 170 F. 2d 531 (C.A. 8th), certiorari denied, 337 U. S. 956.

the transfer was of the sort which leads to a testamentary disposition. *United States v. Wells*, 283 U. S. 102; *City Bank Co. v. McGowan*, 323 U. S. 594; *Allen v. Trust Co. of Georgia*, 326 U. S. 630; see also Treasury Regulations 105, Section 81.16 *supra*. As the Supreme Court stated in *Allen v. Trust Co. of Georgia, supra*, p. 635:

Since the purpose of the contemplation of death provision was to reach substitutes for testamentary dispositions in order to prevent evasions of the tax (*United States v. Wells, supra*, pp. 116-117), *the statute is satisfied, it is said, where for any reason the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control or in some manner affect its devolution.*

That is a correct statement of the governing principle for it presumes the existence of the requisite motive. * * * (Italics supplied.)

Taxpayer's burden was to prove not only that the decedent, in making the transfers here involved, was motivated by "purposes associated with life, rather than with the distribution of property in anticipation of death" but that such a purpose was the decedent's dominant, controlling or impelling motive. *Allen v. Trust Co. of Georgia, supra*, pp. 635-636.

Taxpayer asserts that the decedent's transfers were occasioned by an affirmative living motive of removing an important obstacle to his remarriage. (Br. 22-29.) We do not understand taxpayer to contend that the decedent's contemplated remarriage of itself is sufficient as a living motive for making the transfers. Such a contention would in any event have no merit. As the Court of Appeals for the Sixth Circuit stated in *In re Kroger's Estate*, 145 F. 2d 901, 906:

No strength inheres in the argument that the decedent's mere contemplation of marriage estab-

lishes for the transfers a life motive associated with marriage rather than a motive to prevent his proposed marriage from interfering with the devolution of the bulk of his property to his children and grandchildren at his death.

The so-called "obstacle" to the decedent's remarriage which taxpayer contends the decedent was motivated in removing relates to the objections of the decedent's sister, Mrs. Jenks, and her husband.² Taxpayer does not clearly explain just what objection of the Jenks she contends the decedent was motivated in removing. However, as taxpayer states (Br. 24), the decedent was indebted to Mrs. Jenks on a note in the amount of \$41,650 on which he had paid no interest since 1936. Mr. Will, the decedent's son-in-law who drew the transfer instruments, testified that as to the Hartford Building property the Jenks' "primary interest was to get the note secured" (R. 174), and the Tax Court so found (R. 81).³ It therefore appears to be taxpayer's contention that the decedent, in making the transfer of his interest in the Hartford Building property, was motivated by a desire to provide for security on or payment of his indebtedness to Mrs. Jenks. (Br. 24-25.) In any event, that is the only contention which taxpayer could possibly make on this record. With respect to the Lake Beulah property, it appears that taxpayer's contention is that the decedent transferred his interest therein in order to mollify the Jenks' irritation at his failure to pay half of the ex-

² As the Tax Court found (R. 80) and taxpayer states (Br. 23), the decedent's children were pleased with the prospect of his remarriage.

³ Mr. Jenks was evidently concerned with other financial angles respecting the Michigan Avenue property (see R. 81), but the decedent's transfer of his interest in that property is not directly involved here. The transfer was by a revocable trust and the property was for that reason includible in his gross estate regardless of his motive for making the transfer.

penses connected with the property and because of the Jenks' "undercurrent of feeling" that a new wife might not fit congenially into the family circle at Lake Beulah. (Br. 33.)

The decedent's transfers of his interest in the Hartford Building and Lake Beulah property were two of the three transfers he made on September 17, 1938, approximately six weeks before his remarriage. The Lake Beulah property he conveyed outright to his children. (R. 73.) His interest in the Hartford Building he irrevocably conveyed to his children in trust subject to the payment of the principal, accrued interest, and future interest on his note to Mrs. Jenks. (R. 20-32.) As to his interest in the Michigan Avenue property, he created a trust (R. 33-48) which, because it was revocable, was included in his gross estate and did not give rise to any part of the estate tax deficiency involved here. Under this latter trust the net income was payable to the decedent for his life except that, if the Hartford Building trust did not pay \$1,000 a year as interest to Mrs. Jenks, that part of \$1,000 which the Hartford trust did not pay to Mrs. Jenks was to be paid from the net income of the Michigan Avenue property trust. After the decedent's death, the net income was payable to the decedent's children, except that (1) Mrs. Jenks, if she survived the decedent, was to be paid such portion of the income as might be necessary to assure her an income of \$1,000 a year from the Hartford Building trust and this trust, and (2) the decedent's prospective wife, if she survived him, was to receive \$1,500 a year for her life. The trust was terminable after the death of Mrs. Jenks and the decedent's wife and upon termination the corpus was payable to the decedent's children or their appointees, etc.

The effect of the transfers is evident. By making the transfers, the decedent provided security for his note

indebtedness to Mrs. Jenks and for payment of interest on the indebtedness; retained substantially the same amount of income he had been receiving;⁴ made provision for an annual payment to his prospective wife beginning at his death; and, by the conveyances to his children, prevented his prospective wife from having dower or other statutory rights in the property at his death. The logical conclusion is that in making the transfers the decedent was motivated by the thought of death in the sense that he intended to prevent his proposed marriage from interfering with the devolution of these properties to his children at his death. As will be seen later, there is some affirmative evidence to support such a conclusion and, thus, that the transfers were made in contemplation of death within the meaning of Section 811(c) of the Code.

It should first be noted that the fact that the Hartford trust provided security for Mrs. Jenks' note and for payment of interest on the note does not explain the transfer of decedent's interest in the property to his children. The note was for not more than \$45,000 including interest, whereas the decedent estimated that his interest in the building was worth about \$175,000, and taxpayer has not contested the Commissioner's figure of \$120,-621.32. (R. 79.) Accordingly, as the Tax Court stated (R. 91-92):

It is, of course, at once obvious that a conveyance of the property by way of security, by mortgage or deed of trust, conditioned upon payment of the indebtedness on the decedent's note without the further transfer of the corpus to the children as

⁴ At that time the Michigan Avenue property constituted the sole source of decedent's income (R. 162), although the Hartford Building property was improving (R. 163-164). Under a lease on the Michigan Avenue property the decedent received \$6,000 a year. (R. 77.) This he retained under his transfer in trust of the property, since the income was payable to him for life subject to possible payment of \$1,000 a year to Mrs. Jenks.

beneficiaries, would have given Mrs. Jenks just the same protection as she received from the conveyance of the Hartford Building; * * * Why then did the decedent make the further and financially unnecessary conveyances to the children? The element of lack of financial necessity therefor destroys, in our view, the argument that the dominant motive in the transfers was the satisfaction of Jenks and wife. It simply is not reasonable to say that it was necessary to transfer to the children, as well as secure Mrs. Jenks. Nothing in the record indicates that she, or her husband for her, required conveyances of the breadth actually made. On the contrary, Will, when asked "was it Mr. and Mrs. Jenks' thought at all, did they insist that the provisions go in, the two trusts relative to the distribution of corpus to the children at termination of such trust?" answered "No, they did not," and later said that their primary interest in the Hartford trust was to get the note secured. He, the attorney in the matter, did not recall that he "ever explained to them the complete distribution of the corpus of those trusts." * * *

Similarly, there is nothing in the record to show that the decedent transferred his interest in the Lake Beulah property to his children because of the Jenks' objections. The record amply reflects that the decedent was aware that the Jenks objected to his remarriage because of his indebtedness to Mrs. Jenks (R. 129-130, 132, 158, 159), but the outright transfer of his interest in the Lake Beulah property to his children in no way relieved that indebtedness. Moreover, there is no evidence to show that the decedent was ever informed of any objection the Jenks might have had with respect to the Lake Beulah property or that the Jenks had any objection to his remarriage other than his indebtedness to Mrs. Jenks. In making the transfers the decedent could not of course have been motivated by an objection of the Jenks of which he was unaware. In addition, it ap-

pears that the Jenks actually had no serious objection to the decedent's remarriage so far as the Lake Beulah property was concerned. Mrs. Jenks testified that she had no feeling about a new wife occupying the summer home at the lake (R. 114) and, while Mr. Jenks apparently thought the decedent should be relieved of the burden of his share of the upkeep which he had not always paid anyway, Mr. Will testified that Mr. Jenks' feeling about the Lake Beulah property was not as strong as on the business properties (R. 171).

Thus, in contending that the decedent's transfers to his children of his interest in the Hartford Building and Lake Beulah properties were motivated by a desire to remove an obstacle to his remarriage, taxpayer is in effect contending that the decedent was motivated by a desire to remove an obstacle which did not exist. Such a contention is of itself anomalous. It is even more anomalous that taxpayer should insist by implication that, when the decedent was contemplating remarriage at his late age (75 years) to a much younger person and when he would naturally be concerned about his financial resources and the devolution of his property at his death, he gave no thought to the fact that he was unnecessarily making transfers of property to his children. Taxpayer's contention respecting the decedent's motive really amounts to an assertion that the decedent let his son Hyde and Mr. Will, his son-in-law, deprive him of the bulk of his property without his knowing about it or caring.

Taxpayer's own evidence makes it reasonably apparent that the decedent, though not one to be concerned with business matters, did in fact know what he was doing. Both the decedent and his prospective wife were told that the Jenks' objections to the decedent's remarriage were based upon the decedent's indebtedness to Mrs. Jenks (R. 129-130, 132, 158, 159) and to his pros-

pective wife the decedent indicated "that the reason Mr. and Mrs. Jenks had some objections to the marriage was that he owed them quite a large sum of money, a debt contracted, * * * (R. 129-130). The contents of the transfer instruments were explained to the decedent by both his son Hyde and Mr. Will, his son-in-law who drew the instruments. Hyde's testimony was that (R. 159-160):

I do not recall having any special or extended conference going over the documents with him except that I did try to make and felt duty bound to make it perfectly clear to him exactly what they meant and what they covered. * * *

Mr. Will testified as follows (R. 169-170):

I had discussed the trust instruments with the deceased in a general way prior to September 17 when he came to my office to sign them. On that day I went over the instruments with him, high-spotted the important provisions, and we discussed them rather thoroughly at that time. * * *

Mr. Will also conceded that "it must have been pointed out to Mr. Gillette that the corpus of the Michigan Avenue trust would eventually go to his four children" (R. 173) and that the decedent "realized that the Michigan Avenue trust was revocable" (R. 176).⁵ Even a very general explanation of the trusts and of the warranty deed transferring the decedent's interest in the Lake Beulah property would have been sufficient to inform the decedent that he was making transfers of his interest in the properties to his children. Since he thought that his indebtedness to Mrs. Jenks was the only reason for the Jenks' objection to his remarriage and estimated that his interest in the Hartford building property was

⁵ The decedent did in fact amend the trust on March 8, 1939 (R. 49-53), approximately six months after he made the transfers, and also revoked the trust in part on September 3, 1940 (R. 55-58).

worth \$175,000 as against his indebtedness of approximately \$45,000 to Mrs. Jenks, he could not have helped knowing that the transfers to his children of his interest in the Hartford Building and Lake Beulah properties were unnecessary to remove the Jenks' objections to his remarriage. It is therefore futile for taxpayer to contend in effect that the decedent blindly signed the transfers in order to eliminate the Jenks' objection to his remarriage.

As previously stated, there is also affirmative evidence that the decedent's transfers were made in contemplation of death. The Michigan Avenue trust provided that, after the decedent's death, \$1,500 a year of the trust income should be paid to decedent's wife or widow for life. As to this, Hyde Gillette testified (R. 160):

I originated the idea that the trust of the Michigan Avenue property should pay the amount of \$1,500 to Mrs. Gillette if she married my father and should survive him. In thinking of the matter during the summer I realized that I would have to make the arrangements I was trying to make acceptable to him, and I knew that he couldn't feel happy in his marriage if he had not made some provision for his contemplated wife and that was the reason that I suggested the figure to him and suggested that arrangement.

If the provision for payment of \$1,500 a year at decedent's death to the decedent's then prospective wife was necessary to make the transfers acceptable to the decedent, as Hyde in effect testified, the decedent must have been thinking of the consequences of his death so far as his property was concerned. Indeed, other evidence reflects that he did have such thoughts. The plan for the transfers included the execution of an antenuptial agreement (R. 61-68), which recited that the decedent had conveyed his undivided interests in the Hartford Building, Michigan Avenue and Lake Beulah

properties; that he intended to provide for the payment out of the income of the Michigan Avenue property the sum of \$1,500 a year to his wife for life commencing with the decedent's death; and that, in consideration of the provision for payment of that sum out of the income of the Michigan Avenue property, his prospective wife waived her dower and other statutory rights which might become vested in her in the Hartford Building, Michigan Avenue and Lake Beulah properties.

The plain inference to be drawn from the provisions of this agreement cannot be disregarded on the ground that the decedent had no knowledge of the provisions or did not intend what they imply. At the time the decedent signed the transfers on Saturday, September 17, 1938, the agreement was given to him to discuss with his prospective wife and it was arranged then that she should come in the following Monday to sign it. (R. 86.) Accordingly, it was apparently already known that she had no objection to the agreement. Over the week-end the decedent mentioned and showed the agreement to her but did not discuss it. (R. 131.) She signed it the following Monday (R. 87), as planned. On April 24, 1939, about seven months later and six months after his marriage, the decedent executed a will in which he bequeathed all his property to his wife and did not mention his children. (R. 87.)

The decedent was then 75 years of age and contemplated marriage with a much younger person. He had great love for his children. (R. 133, 173.) He obviously knew that the effect of the transfers and antenuptial agreement was to bar his prospective wife's dower or other rights in the properties which had been the subject of the transfers, that he was conveying his interests in the properties to his children, and that he had provided for his prospective wife's welfare after his death to the extent that in the Michigan Avenue trust

he had provided for payment of \$1,500 a year to her after his death. It is a natural conclusion that he intended to prevent his marriage from affecting the devolution of these properties to his children and intended the transfers as substitutes for testamentary dispositions to his children, with the result that the transfers of his interests in the Hartford Building and Lake Beulah properties were made in contemplation of death.⁶ Cf. *In re Kroger's Estate, supra*.

Affirmance of the Tax Court's decision does not of course require acceptance of that conclusion. It is sufficient that the evidence does not show that the decedent's dominant motive in making the transfers was a life motive. Quite plainly, we submit, the Tax Court was correct in concluding that taxpayer had not met her burden of proof.

⁶ The record is remarkably silent as to any expression on the part of the decedent with respect to disposition of any of his property to his children at his death. It seems a natural conclusion that, at his age and with the great love he had for his children, it was assumed and understood by the decedent, the children and the Jenks that the children were to receive the bulk of his property at his death and, thus, that no expression on the decedent's part was necessary. In this connection, as well as in connection with taxpayer's contention as to decedent's motive in making the transfers, it is interesting to note that Mrs. Jenks conveyed her own half interest in the Hartford Building property to the decedent's children, her nieces and nephews, in December, 1940 (R. 175), while her husband was still alive (R. 165) and just a little over two years after, according to taxpayer's argument, decedent made the transfers of his interest in the Hartford Building property in order to provide security or payment of his indebtedness to Mrs. Jenks.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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FEBRUARY, 1950.

In the
United States Court of Appeals
For the Ninth Circuit

ESTATE OF EDWIN F. GILLETTE, HARRIETTE
O'NEIL GILLETTE, EXECUTRIX,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONER.

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MAR 1 - 1950



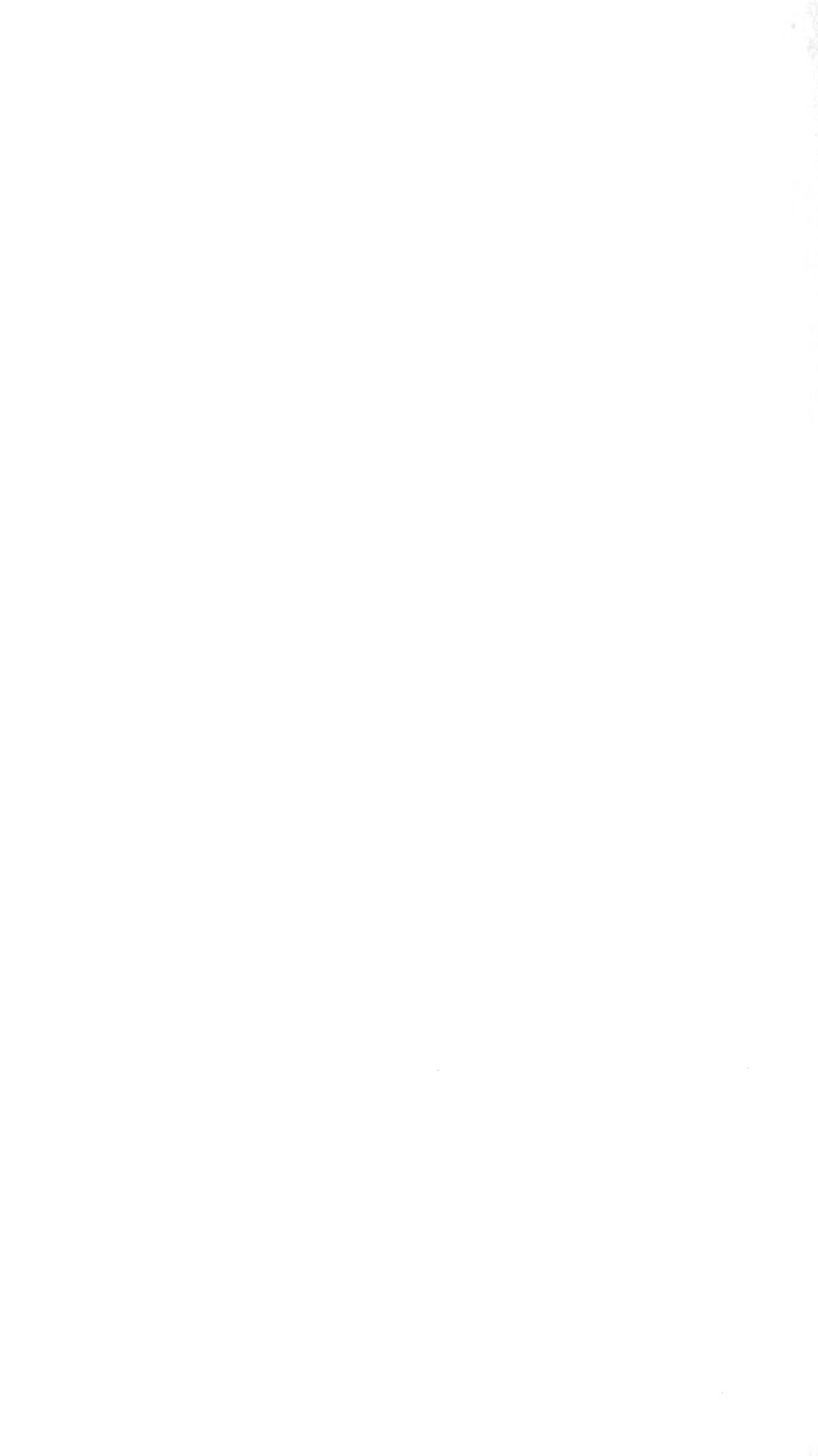
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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

No. 12379.

ESTATE OF EDWIN F. GILLETTE, HARRIETTE
O'NEIL GILLETTE, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER.

Respondent's brief consists largely of a restatement of the reasons given by the Tax Court for its decision. Accordingly, most of respondent's present argument has already been answered in petitioner's main brief. However, some of the points urged by respondent call for further comment.

I.

Preponderance of Evidence, Not "Burden of Proof" or a Presumption, Is Controlling.

Respondent opens and closes his argument with the proposition that petitioner has not met a burden of proving incorrectness of the respondent's determination. We respectfully submit that this misstates the issue before the Court. The true issue is whether the evidence in this pro-

ceeding shows that the decedent was or was not motivated by contemplation of death in transferring the Hartford Building and Lake Beulah properties.

When the petition was filed with the Tax Court, there was a presumption that the respondent's determination was correct. That presumption vanished when evidence was introduced. (Pet. Main Br. 40-43.) From that time on the parties were on an equal footing. Preponderance of the evidence should have been the determining factor.

The Tax Court failed to treat the parties equally. It weighed the presumption against the evidence. Respondent would perpetuate that error. His attempt to take shelter under a non-existent presumption is a tacit recognition that he cannot face the true issue and let the case be decided, as it should be, upon the evidence.

The determination of this issue does not impose an undue burden upon this Court. Substantial conflicts do not appear in the evidence. The conflicts come between the evidence and the inferences or assumptions made by the Tax Court and the respondent. This Court is authorized and competent to strike down unwarranted inferences and assumptions and reach the proper conclusion on the actual facts. (Pet. Main Br. 19-21.)

II.

Decedent's Health, Character and Attitude Toward Property Have Affirmative Significance.

Respondent attempts to avoid the force of the abundant evidence of decedent's character, activities, health and mental attitude. (Resp. Br. 18.) This evidence was of substantial significance in these respects:

(1) *Decedent Reacted Only to Imminent Problems.* Respondent freely recognizes that this evidence established

that the decedent had no thoughts of imminent death in 1938. The evidence of decedent's character, consistent over a period of 20 years or more, showed plainly that he was not a man who would look far into the future and be influenced by remote motives. He was a man who reacted only to immediate problems, and then only when action was forced upon him. An imminent motive was the only sort of thing that would influence him. Accordingly, a showing that he did not contemplate imminent death is alone sufficient to establish that the property transfers were not made in contemplation of death.

(2) *Concern Over Property and Its Devolution Was Foreign to Decedent's Character.* The evidence stands squarely opposed to respondent's assertion that decedent "would naturally be concerned about his financial resources and the devolution of his property at his death,"* and that "the logical conclusion is that in making the transfers the decedent was motivated by the thought of death in the sense that he intended to prevent his proposed marriage from interfering with the devolution of these properties to his children at his death." (Resp. Br. 24, 22.) For more than 20 years before 1938 the decedent had shown no worry, concern or foresight over property matters. He had not conserved or enhanced his property for himself or for the future benefit of his children. With these facts as a premise, to infer that the decedent suddenly became concerned

* In *Colorado Nat. Bank v. Comm.*, 305 U. S. 23 (1938), the decedent, age 80, created an \$800,000 trust, with the income to be accumulated for his life, then paid to his daughter for her life with remainders to her descendants. His motive was to secure this property for his descendants and protect it from his stock market speculations. In ruling that this transfer was not made in contemplation of death, the Supreme Court said (p. 27) :

"The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was 'in contemplation of death.' Broadly speaking, thoughtful men habitually act with regard to ultimate death, but something more than this is required in order to show that a conveyance comes within the ambit of the statute."

It is plain that Mr. Gillette was far less concerned with property matters and remote events than the normally thoughtful man visualized by the Court.

in 1938 over the devolution of property at his death is not good logic. It is a *non sequitur*.

(3) *Decedent Did Not Actively Contemplate Death.* Respondent attempts to impose upon petitioner a burden of proving that the transfers were affirmatively motivated by purposes associated with life. While we believe that the evidence does clearly show such motives dominating the Gillette transfers, we submit that petitioner does not have that heavy a burden. The fundamental issue posed by the statute is whether the decedent was motivated by contemplation of death. Such contemplation may be negated by showing that the transfers were actuated by affirmative living motives. But it can also be negated by showing that the thought of death was not present in the decedent's mind in such force that it would have caused him to take the action under consideration. (Pet. Main Br. 37-40.)

There is abundant evidence in this case that decedent was not the sort of man to entertain such thoughts, or to be motivated by them. Respondent seeks to avoid the force of this evidence, for he has no answer to it.

III.

The Evidence Shows Only a "Living" Motive.

When decedent proposed to marry Miss O'Neil, he told his children that he feared she would not accept unless she were welcomed into the family circle. (Ex. 20: R. 148.) Mrs. Jenks, his sister, and her husband, had objections to the marriage going far beyond a mere lack of warmth. His son, Hyde Gillette, knowing of these objections and seeking to assure his father's marriage and happiness, worked out a detailed program with the assistance of his brother-in-law, Howard Will. After all the details of this program had been developed, it was presented to decedent as a

means of removing the objections to his marriage. It was accepted by him on that basis.

In an effort to avoid this clear-cut "living" motive and to find some justification for the Tax Court's decision, respondent commits a major fault. He attributes to decedent a participation in the detailed planning, although the evidence shows he had no part in it. Respondent contends, in effect, that Hyde Gillette and Howard Will were concerned over the devolution of decedent's property at his death, even impugning their motives in planning the transfers (Resp. Br. 24), and then asserts or assumes, again contrary to the evidence, that decedent had the same thoughts.

The evidence is that in June 1938 decedent was aware that the Jenkses had some objection on financial grounds to his marriage, and when Miss O'Neil visited Chicago in that month she discussed the situation with Hyde Gillette. This necessarily involved only generalities since the ultimate program had not been formulated at that time. It was subsequently developed in detail, but Hyde Gillette purposely did not communicate with decedent on the subject. He waited until his father came to Chicago to discuss it with him.

The matter of providing security for the note owed by Mr. Gillette to Mrs. Jenks was the initial problem, but it was not the only one. Mr. Jenks was also concerned about encumbrances of the decedent's interest in both the Hartford Building and Michigan Avenue properties. (R. 152-153, 162.) This would not have been prevented by a mere mortgage to Mrs. Jenks. Had decedent further encumbered his interest in either property, and a creditor succeeded to his interest, Mrs. Jenks would have been left with a stranger as co-owner and with the possibility of a partition suit and forced sale, with damaging financial consequences

to her. There were even more immediate problems in connection with the Michigan Avenue property. (R. 153-154, 169, 170-171.) To meet these problems posed by Mr. Jenks, transfers in trust of both properties were included in the plan, fortified by an antenuptial agreement. (R. 155-156, 167-168.) To forestall objections by decedent, Hyde proposed inclusion in the Michigan Avenue trust agreement of an income provision for decedent's prospective wife.

The fact that respondent will not face is that the entire program, both in broad outline and details, was formulated by Hyde Gillette and Howard Will. The decedent did not participate. After all the details had been worked out, it was presented to him as an overall program, designed to meet all the points that had been raised by Mr. and Mrs. Jenks without, at the same time, causing undue detriment to decedent.

“My father's reaction to the plan was that if Howard and I thought it was all right and it met the problems that had arisen for us to go ahead and draw up the instruments.” (Testimony of Hyde Gillette, R. 159.)

Respondent purports to find it remarkable that there was no expression on the part of the decedent with respect to disposition of any of his property to his children at his death. (Resp. Br. 28, footnote 6.) We do not find it remarkable that the decedent, in September, 1938, acted entirely in keeping with his character over many years preceding. We think it remarkable that respondent should expect this Court to consider that, because he was contemplating remarriage, he would naturally be concerned about his financial resources and the devolution of property at his death, particularly in view of his lack of interest in property matters displayed for so many years theretofore.

The evidence is that Hyde Gillette and Howard Will went out of their way to attempt to explain the program to Mr.

Gillette, not because he was concerned over its details but because they felt it their duty to do so, and that they had some difficulty in getting beyond generalities in the discussion.

“He wasn’t a man whom you can discuss complicated business matters with very well. * * * he never said that he wanted his property divided after his death among his children. I had no such discussions as that with him.” (Testimony of Howard A. Will, Pet. Main Br. 26-27.)

By this same process of attempting to support his position by attributing thoughts to the parties which they did not in fact entertain, respondent again disregards uncontradicted testimony when he discusses the antenuptial agreement. He says (Resp. Br. 27) that on September 17, 1938, when decedent signed the trust agreements, it was apparently already known that Miss O’Neil had no objection to the antenuptial agreement. But her direct testimony was that the subject of the antenuptial agreement was first mentioned to her later on that week-end when Mr. Gillette visited with her at Kenilworth, Illinois. That discussion did not go into any details. She first examined the agreement on the following Monday when she signed it. (R. 131; Pet. Main Br. 27, 35-37.)

It was the same sort of unsupported inferences and assumptions in the Tax Court’s opinion that require its reversal.

IV.

A “Living” Motive for the Lake Beulah Conveyance Is Adequately Shown.

Respondent’s principal contention with respect to the Lake Beulah property appears to be that decedent was not aware of any objections by Mr. and Mrs. Jenks in connection with that property, or even that they did not make

any serious objection. He also seizes upon a statement by Mrs. Jenks that she had no feeling about a new wife occupying this summer home.

At the time of the hearing Mrs. Jenks, who was subpoenaed by respondent, was 81 years of age, was hard of hearing and had difficulty understanding questions put to her, and was forgetful of such things as the year that her husband died and the year in which her brother was married. (R. 113-114; Steno. Trans. 18.) Although in 1938 she joined vigorously in objecting to the proposed marriage (R. 117, 118-119, 152-153, 157, 162, 166-167, 171), she now has little recollection of these events. The fact that her bitterness of 1938 has now been forgotten is a tribute to the success of the overall program proposed by Hyde Gillette at that time.

When the problems attending the Lake Beulah property were discussed with Miss O'Neil in June, 1938, she readily appreciated the situation. (R. 130, 157.) It can scarcely be assumed that decedent would be less sensitive to the personal complications involved in bringing a new wife to the family summer residence at Lake Beulah as co-head of the household. Respondent's attempt to show that decedent had no motive for transferring the Lake Beulah property except the far-fetched inference that he wanted to bar a dower right in his new wife, is not borne out by the evidence and can not stand the test of good judgment.

V.

The Kroger Case Does Not Support Respondent.

Since the decision in *Estate of B. H. Kroger*, 145 F. (2d) 901 (CCA 6, 1944), affirming a Tax Court memorandum decision, CCH Dec. 13,438(M),* it has become something

* When the *Kroger* appeal was heard, the *Dobson* rule was in effect. This has now been removed by legislation. (Pet. Main Br. 19.)

of a fad in the administration of the federal estate tax for the Commissioner to assert, in virtually every case of a transfer shortly before remarriage for the benefit of children of a prior marriage, that the decedent was acting to bar dower rights at his death and so was acting in contemplation of death. Respondent asserted that ground in the present case (R. 12), and now apparently seeks to maintain that position. The most important points of dissimilarity between the *Kroger* case and the *Gillette* case are as follows:

(1) Kroger transferred over half of his property for the clear-cut purpose of defeating statutory dower rights of his prospective wife in the event she should survive him, a likely event. This motive originated with Kroger and was the sole motive for the transfer. It was in keeping with his character as a successful businessman, responsible for the development of one of the largest grocery chains in the nation. By long-range planning he had started out with nothing and built a fortune. When he approached remarriage, he likewise contemplated the long-range consequences.

Comparable long-range vision or planning is completely inconsistent with Mr. Gillette's character. He had shown little concern over the property he owned. He did not enhance his patrimony, but dissipated it. It was no more than sources of income to him, and when some of the sources dried up he made no attempt to revive them. With such a long continuing lack of concern over the conservation of his property, it would have been wholly out of keeping with his character to have suddenly become concerned over its devolution at his death.

(2) Kroger thought directly of the effect of his remarriage upon the devolution of his property. This chain of reasoning led him directly to the creation of the trust.

Gillette's course of action was completely different. His

prospective marriage created not a whit of concern in his mind as to his property. His primary concern was the marriage itself.

The motive for Gillette's transfers originated with others. Mr. Jenks was concerned with repayment to his wife of the debt owed her by decedent, and protection of his wife's interest in property owned jointly with Gillette. Hyde Gillette, recognizing that the attitude of the Jenkses could wreck the marriage, or, at the least, would disrupt family harmony, proposed steps that would overcome these objections. Gillette's only motive was to do what seemed necessary to accomplish his marriage with the good wishes of his entire family. None of these motives looked towards decedent's death.

(3) Kroger's trust accomplished only one thing, the diversion of property from his wife to his children at his death. This was his sole objective. He even reserved the trust income to himself for his life.

Gillette's transfers of the Hartford Building and Lake Beulah properties accomplished his objective of removing obstacles to his marriage. In addition, his personal liability on the debt to his sister was provided for in such fashion that it would never trouble him again, and he was also relieved from any further obligation to share in the expense of the Lake Beulah property. Such considerations find no parallel in the *Kroger* case.

(4) Respondent conceives of a wife's dower interest as something that becomes important only at her husband's death. It was that particular aspect of dower, and that only, that was important to Kroger. But a wife's dower right has important attributes, attaching to her husband's real estate at the moment of marriage. (Pet. Main Br. 35-36.) It was the danger of such a right in Harriette O'Neil, attaching at the moment of marriage, that caused the parties in this case to fear impairment of title to the Hartford

Building and Michigan Avenue properties. This fear of an immediate consequence of the marriage has no relation to contemplation of death.

At the time that Kroger made the transfer that was held taxable, he made some additional transfers, also of substantial amounts, to his children and other relatives. The donees were entitled to immediate benefits. Kroger did not reserve a life income in this property. It is significant that these transfers were held not to have been made in contemplation of death.

Conclusion.

It is submitted that the Tax Court's conclusion was clearly erroneous and should be reversed with the finding that this decedent's transfers of the Hartford Building and Lake Beulah properties were not made in contemplation of death.

Respectfully submitted,

EDWARD H. McDERMOTT,

WM. M. EMERY,

JOHN S. PENNELL,

Counsel for Petitioner.



No. 12380

United States
Court of Appeals
For the Ninth Circuit.

EDWARD JACKSON MURRAY,
Appellant,
vs.

LIEUTENANT GENERAL ALBERT C. WEDE-
MEYER, United States Army, Commanding
General, San Francisco Port of Embarkation,
Fort Mason, California,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

NOV 25 1949

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Appellee.

In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 28431-R

In the Matter of the Application of
EDWARD JACKSON MURRAY, for a Writ of
Habeas Corpus.

PETITION

The petition of Edward Jackson Murray respectfully shows:

That the said Edward Jackson Murray is unlawfully imprisoned, detained and restrained of his liberty by the Commander of the United States Army Transport General Hodges, by the Commanding General of the San Francisco Port of Embarkation, Major General James A. Lester, Fort Mason, California, and by Lieutenant General Mark Clark, Commanding General of the Sixth Army, Presidio of San Francisco.

The summary of the steps leading to such imprisonment, detention, confinement and restraint are as follows:

That petitioner was taken into custody at San Francisco Port of Embarkation on or about February 3, 1947, by the United States Army authorities and returned to Japan under guard and placed in confinement incommunicado in the Eighth Army Stockade on February 18, 1947, and so remained for several weeks thereafter. The charges were

served upon petitioner on March 10, 1947, charging him with violation of the 95th Article of War (Charge I) in wrongfully appropriating to his own use about five hundred diamonds of the value of about \$200,000.00, property in the custody of the United States charged to him as custodial officer Headquarters Eighth United States Army, to be held for the United States; with violation of the 96th Article of War (Charge II) Specification I, in wrongfully appropriating to his own use about five hundred diamonds of the value of about \$200,000.00, property in the custody of the United States; Specification II the same act as to four diamonds of the value of about \$10,000.00; Specification III, wrongfully introducing into the United States about April 4, 1946, without paying custom duties thereon about five hundred diamonds of the value of \$200,000.00; Specification 4, on February 3, 1947, wrongfully executing a false customs declaration in failing to schedule four diamonds of the value of \$10,000.00; Specification 5, wrongfully introducing into the United States without paying customs duties thereon four diamonds of the value of \$10,000.00; that petitioner was arraigned and pleaded not guilty before a general court martial appointed by the Commanding General Eighth Army, April 14, 1947, and the trial continued with various continuances until May 29, 1947, when petitioner was found guilty of all charges and specifications with words of exception as to the value of the diamonds reducing the value

of the five hundred diamonds to \$84,000.00 and of the four diamonds to \$8,000.00, and was sentenced to be dismissed from the service, to forfeit all pay due and to become due and to be confined at hard labor at such place as the reviewing authority may direct for ten years. The Reviewing Authority, Commanding General Eighth Army approved the sentence, reduced the confinement to eight years and designated United States Disciplinary Barracks, Fort Leavenworth, Kansas, as place of confinement. The Board of Review in Judge Advocate General's office, March 4, 1948, found record legally sufficient to support the findings and sentence and on March 30, 1948, the Judge Advocate General recommended to the Secretary of the Army confirmation of the sentence, but reduction of the term of confinement to five years. Thereafter, the Secretary of the Army confirmed the findings and sentence as recommended. The petitioner is due to arrive at San Francisco Port of Embarkation aboard the United States Army Transport General Hodges on or about November 16, 1948, as a general prisoner enroute to United States Disciplinary Barracks, Fort Leavenworth, Kansas, and upon arrival will come under command of Commanding General, San Francisco Port of Embarkation and Commanding General Sixth Army.

That petitioner's imprisonment, detention, confinement and restraint are illegal and that the illegality thereof consists in this, to wit:

1. That while petitioner was in confinement at

Eighth Army Stockade, incommunicado, he was interrogated before trial by the Inspector General Eighth Army, his assistant, Colonel Gorman and Captain Carrier, Judge Advocate General's Department, at the outset of the interview the petitioner stated that he was unwilling to answer any questions without advice of counsel. Whereupon not only the Inspector General, but also Captain Carrier, representative of the Judge Advocate General's Department, told the petitioner that he was not entitled to advice of counsel and had to answer, etc. Thereupon he was subjected to a searching interrogation for many hours by all three, the result of which was used in evidence against him. These false statements as to petitioner's right to advice of counsel by the Inspector General and the Judge Advocate General officer resulted in a violation of petitioner's rights under the constitution, and any confession or admissions under all the circumstances cannot be considered voluntary.

2. After a twenty-four day continuance from the 18th day of April, 1947 to May 12, 1947, granted prosecution to obtain further evidence, petitioner's request for two weeks adjournment to obtain a necessary defense witness from Shanghai and order therefor was denied. (R 169). This was a clear violation of petitioner's rights guaranteed by the 6th Amendment and results in loss of court martial's jurisdiction and its judgment becomes void.

3. Petitioner was denied due process of law by

the use of perjured testimony of alleged diamond experts in identifying eight of the diamonds seized from petitioner as having been purchased for Koeki-Eidan, and it follows that his conviction is void.

4. There is not legal evidence to establish the corpus delicti as to the Charge I and Specifications 1 and 2 of Charge II.

The testimony, if believed, of the prosecution witnesses identified eight diamonds seized from petitioner, as having been purchased by Koeki-Eidan; that on October 18, 1945, nine thermos bottles of diamonds were delivered by Koeki-Eidan from Mitsui Trust Co. vaults to Captain Katz of the American Army, who with other American soldiers took them to the Bank of Japan. No receipt given. At Mitsui Trust Co. asked to show largest diamond, witness said largest diamond Koeki-Eidan had was 16K but it was not there, so showed a 12K or 13K diamond. Between October 18, 1945 and November 22, 1945, First Cavalry Division was in charge of Bank of Japan vaults. The 18.44K diamond identified as having been purchased for Koeki-Eidan in 1944, apparently was not turned over to Koeki-Eidan. There is no evidence that Koeki-Eidan turned over all its diamonds to the Bank of Japan vaults. There is not a scintilla of evidence as to what happened to the diamonds between October 18, 1945 and November 22, 1945; there is no evidence as to what or how many diamonds were turned over to the petitioner on November 22, 1945,

and finally no evidence of any shortage of diamonds in the Bank of Japan vaults.

5. The diamonds brought into the United States by petitioner were brought as gifts to his wife, and were not dutiable under public 633, 77th Congress, Act of June 27, 1942, 50 U. S. Code 801, 802. This act was implemented by War Department letter of August 23, 1945, A.G. 524 which, after quoting Act of June 27, 1942, stated "b Articles acquired abroad by the owner of the baggage for use by him as gifts after they are brought by him to the United States are for the personal use of the owner and are, therefore, entitled to duty free admission under Act of June 27, 1942.

Prosecution's own evidence shows that the four diamonds sold to M. S. Black were sold by petitioner's wife, Mrs. Lodema T. Murray, this together with affidavit of petitioner's wife, Lodema T. Murray, shows that petitioner brought diamonds legitimately to the United States as a gift to his wife. It follows that petitioner was illegally convicted under Specifications 3, 4 and 5 of Charge II.

6. The General Court Martial was illegally constituted and its judgment, therefore, void.

Major General William C. Chase, O-4739, was appointed a member and as senior officer was president of the General Court Martial before which petitioner was tried. Major General Chase was and had been since prior to the occupation of Japan, Commanding General of the First Cavalry Division;

that by virtue of his office he had a direct responsibility for the diamonds in the vaults of the Bank of Japan up to the time your petitioner was appointed custodian of said vaults, i.e., November 22, 1945. These facts were unknown to your petitioner at the time of his arraignment.

Major General Chase's failure to disclose these facts which would have given your petitioner grounds for challenge and relief of said Chase as a member, was prejudicial to petitioner, and leaves the Court illegally constituted and without jurisdiction.

7. Casting up all the errors committed, both in pre-trial procedure and during the trial, together with failure of proof has resulted in depriving your petitioner of the substance of a fair trial.

That no prior application has been made for a Writ of Habeas Corpus in regard to the detention and restraint complained of in this application,

Wherefore, your petitioner prays that a Writ of Habeas Corpus may be granted, directed to the said Major General James A. Lester, Commanding General of the San Francisco Port of Embarkation, Fort Mason, California, Lieutenant General Mark Clark, Commanding General of the Sixth Army, Presidio of San Francisco and the Commander United States Army Transport General Hodges, upon arrival at Fort Mason, California, and each of them to have the body of Edward Jackson Murray before your Honor at a time and place therein to be specified, to do and receive what shall then

and there be considered by your Honor concerning said petitioner, together with time and cause of his detention and said Writ; and that he, said Edward Jackson Murray, may be restored to his liberty.

/s/ JAMES T. DAVIS,
Attorney for Petitioner.

State of California,
City and County of San Francisco—ss.

James T. Davis, being duly sworn, on behalf of the petitioner above named says:

That he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief and as to those matters he believes it to be true; that said petitioner is absent from the City and County of San Francisco, where his attorney resides, and the facts are within the knowledge of this affiant who is the agent of the said petitioner, and therefore makes this affidavit.

Dated: November 12, 1948.

/s/ JAMES T. DAVIS.

Subscribed and sworn to before me this 12th day of November, 1948.

[Seal] /s/ MARION M. BENDER,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Dec. 24, 1950.

[Endorsed]: Filed Nov. 15, 1948.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

On reading and filing the petition of Edward Jackson Murray charging Major General James A. Lester, United States Army, Commanding General of San Francisco Port of Embarkation, Fort Mason, California, Lieutenant General Mark Clark, United States Army, Commanding General Sixth Army, Presidio of San Francisco, the Commander of United States Army Transport General Hodges, and whomsoever with unlawfully imprisoning, detaining and restraining said petitioner of his liberty, and sufficient cause appearing therefor,

It Is Ordered that the said Major General Lester, Lieutenant General Clark and the said Commander of U. S. Army Transport General Hodges, be and appear before this Court in open Court, at the Court Room thereof on the 22nd day of November, 1948, at 2:00 o'clock p.m., to show cause why a Writ of Habeas Corpus should not be issued and this petitioner restored to full liberty as in said petition requested.

It Is Hereby Ordered that a copy of said petition, and of this order be served upon the said Major General Lester U. S. Army, Lieutenant General Clark, U. S. Army and the Commander, U. S.

Army Transport General Hodges at least three days before the said 22nd day of November, 1948.

Dated this 15th day of November, 1948.

/s/ MICHAEL J. ROCHE,

Judge of the District Court of
The United States.

[Endorsed]: Filed Nov. 15, 1948.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the counsel for petitioner and respondents that the Order To Show Cause heretofore made returnable the 22nd day of November, 1948, shall be continued and made returnable the 13th day of December, 1948.

/s/ JAMES T. DAVIS,

Attorney for Petitioner.

UNITED STATES ATTORNEY,

By /s/ JOSEPH KARESH,

Assistant U. S. Attorney.

Dated: November 15, 1948.

It is so ordered this 15th day of November, 1948.

/s/ MICHAEL J. ROCHE,

Judge of the District Court.

[Endorsed]: Filed Nov. 15, 1948.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Come Now your respondents through Frank J. Hennessy, United States Attorney for the Northern District of California, and Joseph Karesh, Assistant United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, show as follows:

I.

Respondents, upon information and belief, admit that petitioner is restrained of his liberty, but deny that such restraint is in any way unlawful and say that they hold custody of the petitioner pursuant to Department of the Army General Court-Martial Orders No. 85, dated 19 April 1948, a copy of which is hereto annexed as Exhibit "A", and is made a part hereof; that petitioner is a general prisoner under said Orders and is enroute from Japan to the United States Disciplinary Barracks for confinement under said Orders.

II.

Further answering, respondents, upon information and belief, admit, in substance, the allegations in the petition alleged as "The Summary of the steps leading to * * * imprisonment, confinement and restraint * * *" but deny that petitioner was at any time held incommunicado.

III.

Further answering, upon information and belief, respondents deny each and every allegation in para-

graphs numbered 1 through 7 in the petition, and say that petitioner received a fair and impartial trial, and was at all times before, during and after said trial by general court-martial afforded every right and privilege to which he was entitled.

Wherefore respondents pray that the petition for writ of habeas corpus herein should be denied and the Order to Show Cause heretofore issued should be discharged.

/s/ FRANK J. HENNESSY,

U. S. Attorney.

/s/ JOSEPH KARESH,

Assistant U. S. Attorney.

EXHIBIT "A"

GCMO 85

Department of the Army

Washington 25, D. C., 19 April 1948

General Court-Martial

Orders, No. 85

Before a general court martial which convened at Yokohama, Japan, 14, 15, 16, 17, 18, April 1947, and 12, 13, 14, 15, 16, 26, 28, 29 May 1947, pursuant to paragraph 13, Special Orders, No. 55, Headquarters Eighth Army, United States Army, APO 343, 7 March 1947, amended by paragraph 2, Special Orders, No. 70, same headquarters, 25 March 1947, was arraigned and tried—

Colonel Edward J. Murray, O166578, Infantry.

Charge I: "Violation of the 95th Article of War."

Specification.—“In that Colonel Edward J. Murray, Headquarters, Far East Command, APO 500, having been assigned as Custodial Officer for Headquarters, Eighth United States Army, of the United States Vaults, Bank of Japan, did, on or about 20 March 1946, at or in the vicinity of Tokyo, Honshu, Japan, wrongfully, knowingly, willfully and without proper authority appropriate to his own use about Five Hundred (500) diamonds, of a value of about Two Hundred Thousand Dollars (\$200,000.00), property in the custody of the United States, charged to him as Custodial Officer, Headquarters Eighth United States Army, to be held for the United States.”

Charge II: “Violation of the 96th Article of War.”

Specification 1.—“In that Colonel Edward J. Murray, Headquarters, Far East Command, APO 500, did, at or in the vicinity of Tokyo, Honshu, Japan, on or about 20 March 1946, wrongfully appropriate to his own use the following property in the custody of the United States, viz, about Five Hundred (500) diamonds, of the value of about Two Hundred Thousand Dollars (\$200,000.00).”

Specification 2.—“In that Colonel Edward J. Murray, Headquarters, Far East Command, APO 500, did, at or in the vicinity of Tokyo, Honshu, Japan, on or about 19 January 1947, wrongfully appropriate to his own use the following property in the custody of the United States, viz, about Four (4) diamonds, of the value of about Ten Thousand Dollars (\$10,000.00).”

Specification 3.—“In that Colonel Edward J. Murray, Headquarters, Far East Command, APO 500, did, at or in the vicinity of San Francisco, California, United States of America, on or about 4 April 1946, without proper authority, wrongfully, knowingly and willfully introduce into the United States, without paying customs duty thereon, about Five Hundred (500) diamonds, of a value of about Two Hundred Thousand Dollars (\$200,000.00).”

Specification 4.—“In that Colonel Edward J. Murray, Headquarters, Far East Command, APO 500, did, at or in the vicinity of San Francisco, California, United States of America, on or about 3 February 1947, wrongfully, knowingly and willfully execute a United States Customs Declaration which he then and there well knew to be false in that he failed to schedule in said United States Customs Declaration Four (4) diamonds, of a value of about Ten Thousand Dollars (\$10,000.00), which he then and there introduced into the United States.”

Specification 5.—“In that Colonel Edward J. Murray, Headquarters, Far East Command, APO 500, did, at or in the vicinity of San Francisco, California, United States of America, on or about 3 February 1947, without proper authority, wrongfully, knowingly and willfully introduce into the United States, without paying customs duty thereon, about Four (4) diamonds, of a value of about Ten Thousand Dollars (\$10,000.00).”

Pleas

To all Specifications and Charges: “Not guilty.”

Findings

Of the Specification of Charge I: "Guilty, except for the words and figures 'about two hundred thousand dollars (\$200,000.00)', substituting therefor, respectively, the words and figures 'about eighty-four thousand dollars (\$84,000.00)'. Of the excepted words and figures, Not guilty; of the substituted words and figures, Guilty."

Of Charge I: "Guilty."

Of Specification 1, Charge II: "Guilty, except for the words and figures 'about two hundred thousand dollars (\$200,000.00)', substituting therefor, respectively, the words and figures 'about eighty-four thousand dollars (\$84,000.00)'. Of the excepted words and figures, Not guilty; of the substituted words and figures, Guilty."

Of Specification 2, Charge II: "Guilty, except for the words and figures 'about ten thousand dollars (\$10,000.00)', substituting therefor, respectively, the words and figures 'about eight thousand dollars (\$8,000.00)'. Of the excepted words and figures, Not guilty; of the substituted words and figures, Guilty."

Of Specification 3, Charge II: "Guilty, except for the words and figures 'about two hundred thousand dollars (\$200,000.00)', substituting therefor, respectively, the words and figures 'about eighty-four thousand dollars (\$84,000.00)'. Of the excepted words and figures, Not guilty; of the substituted words and figures, Guilty."

Of Specification 4, Charge II: "Guilty, except

for the words and figures 'about ten thousand dollars (\$10,000.00)', substituting therefor, respectively, the words and figures 'about eight thousand dollars (\$8,000.00)'. Of the excepted words and figures, Not Guilty; of the substituted words and figures, Guilty."

Of Specification 5, Charge II: "Guilty, except for the words and figures 'about ten thousand dollars (\$10,000.00)', substituting therefor, respectively, the words and figures 'about eight thousand dollars (\$8,000.00)'. Of the excepted words and figures, Not Guilty; of the substituted words and figures, Guilty."

Of Charge II: "Guilty."

Sentence

To be dismissed the Service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for ten (10) years.

The sentence was adjudged 29 May 1947.

The following is the action of the convening authority:

HEADQUARTERS EIGHTH ARMY

UNITED STATES ARMY

Office of the Commanding General

Yokohama, Japan

APO 343

15 July 1947

In the foregoing case of Colonel Edward J. Murray, O166578, Infantry, Headquarters Far East Command, APO 500, the sentence is approved but

the period of confinement at hard labor is reduced to eight (8) years in view of the war record of the accused. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, or elsewhere as the Secretary of War may direct, is designated as the place of confinement. Pursuant to Article of War 48, the order directing the execution of the sentence is withheld.

[Signed] R. L. EICHELBERGER

[Typed] R. L. EICHELBERGER

Lieutenant General, USA
Commanding

The sentence having been approved by the convening authority; the record of trial forwarded under the provisions of Article of War 48; the record of trial having been examined by the Board of Review in The Judge Advocate General's Office; the Board of Review having submitted its opinion in writing to The Judge Advocate General; the opinion of the Board of Review and the recommendations of The Judge Advocate General having been transmitted directly to the Secretary of the Army under the provisions of Executive Order No. 9556, 26 May 1945, and having been laid before him, the following are his orders thereon:

In the foregoing case of Colonel Edward J. Murray (O-166578), Infantry, pursuant to the authority vested in me by Executive Order No. 9556, May 26, 1945, the sentence is confirmed, but the period of

confinement is reduced to five years. As thus modified the sentence will be carried into execution.

KENNETH C. ROYALL,
Secretary of the Army.

April 15, 1948

Colonel Edward J. Murray, O166578, Infantry, ceases to be an officer of the Army of the United States at midnight, 26 April 1948. The Branch United States Disciplinary Barracks, Camp Cooke, California, is designated as the place of confinement, or elsewhere as the Secretary of the Army may direct.

By Order of the Secretary of the Army:

OMAR N. BRADLEY,
Chief of Staff,
United States Army.

Official:

EDWARD F. WITSELL,
Major General The Adjutant General.

[Endorsed]: Filed Dec. 13, 1948.

[Title of District Court and Cause.]

ORDER FOR ISSUANCE OF WRIT OF
HABEAS CORPUS

This matter having come on regularly for hearing this 13th day of December, 1948, on the Petition for Writ of Habeas Corpus, the Order to Show Cause, the Return to Order to Show Cause, and the Traverse to the same, and counsel for the petitioner

and the respondent having in open Court this day been heard, and by oral stipulation agreed that if an Order for a Writ of Habeas Corpus should issue, with the consent of the Court, it should be made returnable on the 10th day of January, 1949, at 10:00 o'clock A.M., the matter thereupon having been submitted, and Good Cause Appearing Therefor,

It is Hereby Ordered that a writ of habeas corpus issue herein, directing the respondent, Brigadier General James A. Lester, United States Army, Commanding General, San Francisco Port of Embarkation, Fort Mason, California, to have the body of Edward Jackson Murray, together with the day and cause of his being taken and detained in this Court on said day and time above mentioned, and then and there to submit to and receive whatsoever the Court shall then and there consider in that behalf.

Dated: December 13, 1948.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

Issued Dec. 13, 1948.

[Endorsed]: Filed Dec. 13, 1948.

United States District Court, Southern Division,
Northern District of California
No. 28431-R

HABEAS CORPUS

The President of the United States of America
To Brigadier General James A. Lester, United

States Army, Commanding General, San Francisco Port of Embarkation, Fort Mason, California.

Greeting:

You Are Hereby Commanded, that the body of Edward Jackson Murray, the Petitioner herein, by you restrained of his liberty, as it is said detained by whatsoever names the said Edward Jackson Murray may be detained, together with the day and cause of being taken and detained, you have before the Honorable Michael J. Roche, Judge of the United States District Court in and for the Northern District of California, at the court room of said Court, in the City of San Francisco at 10 o'clock a.m., on the 10th day of January, 1949, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness the Honorable Michael J. Roche, United States District Judge at San Francisco, California this 14th day of December, A.D. 1948.

C. W. CALBREATH,
Clerk.

By /s/ M. R. GRUBIC,
Deputy Clerk.

UNITED STATES MARSHAL'S RETURN
Northern District
Of California—ss:

Received the within writ the 14th day of Decem-

ber, 1948, and executed same on Major General James A. Lester at San Francisco, California on the 14th day of December 1948.

GEORGE VICE,
U. S. Marshal.

By /s/ HERBERT R. COLE,
Deputy Marshal.

[Received] U. S. Marshal's office S. F. Calif.
Dec. 14, 1948.

[Endorsed]: Filed Dec. 16, 1948 U.S.D.C.

[Title of District Court and Cause.]

RETURN TO WRIT OF HABEAS CORPUS

Comes now James A. Lester, Brigadier General, United States Army, respondent herein, through Frank J. Hennessy, United States Attorney for the Northern District of California, and Joseph Karesh, Assistant United States Attorney for the Northern District of California, and for return to writ of habeas corpus heretofore issued herein, shows as follows:

I.

That the person hereinafter called "the petitioner," on whose behalf the petition for writ of habeas corpus was filed, is detained by the respondent James A. Lester, Brigadier General, United

States Army, in his capacity as Commanding General, San Francisco Port of Embarkation, Fort Mason, California, under and by virtue of the Department of the Army General Court Martial Orders No. 85, dated 19 April, 1948, a copy of which has heretofore been annexed to Return to Order to Show Cause filed herein and made a part thereof as "Exhibit A"; that petitioner is a general prisoner under said orders and is enroute from Japan to a United States Disciplinary Barracks for confinement under said orders.

II.

That the General Court Martial had jurisdiction over the petitioner and the offenses alleged in the charges and specifications heretofore returned against him and on which he was tried and convicted.

III.

That respondent is informed and believes and further alleges that petitioner received a fair and impartial trial and was at all times before, during and after said trial by General Court Martial afforded every right and privilege to which he was entitled; that the sentence which he is now serving is a valid judgment now in full force and effect.

IV.

That the return to order to show cause heretofore filed herein is hereby referred to and incorporated herein as though set forth in full.

Wherefore respondent prays that the petition for

writ of habeas corpus herein should be denied and the writ of habeas corpus heretofore issued should be discharged.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ JOSEPH KARESH,
Assistant U. S. Attorney.
Attorneys for
Respondent.

[Endorsed]: Filed Jan. 10, 1949.

[Title of District Court and Cause.]

ORDER PERMITTING FILING OF AMENDED
OR SUPPLEMENTAL PETITION

Upon motion of James T. Davis, Esq., counsel for petitioner, and good cause appearing therefor,

It is Hereby Ordered, that petitioner herein may file an amendment to his Petition for Habeas Corpus, or an Amended or Supplemental Petition, as the case may require, on or before Monday, February 21, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed Jan. 31, 1949.

[Title of District Court and Cause.]

AMENDMENT TO PETITION FOR WRIT OF
HABEAS CORPUS

Comes now Edward Jackson Murray, and by leave of Court amends his petition for writ of habeas corpus by inserting after paragraph 6 therein, a new paragraph 6 (a) to read as follows:

6 (a) The President of the Court-Martial, Major-General, William C. Chase, during the trial and in the midst of the defendant's motions for findings of not guilty, personally sought new evidence "to get a conviction" thus abandoning his position as a fair and impartial judge and assuming the role of prosecutor. This action upon the part of Major-General Chase clearly constituted a denial of due process of law and, assuming but not admitting the original jurisdiction of the Court-Martial, the same was totally lost as a result of such action.

/s/ JAMES T. DAVIS,

Attorney for Petitioner.

State of California

City and County of San Francisco—ss.

Edward Jackson Murray, being duly sworn, deposes and says:

That he is the petitioner in the above-entitled action; that he has read the foregoing Amendment to Petition for Writ of Habeas Corpus and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated

on information or belief, and as to those matters he believes it to be true.

/s/ EDWARD JACKSON
MURRAY.

Subscribed and sworn to before me this 21st day of February, 1949.

[Seal] /s/ J. P. WIKT,
Deputy Clerk of the
District Court.

[Endorsed]: Filed Feb. 21, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL RETURN TO WRIT OF
HABEAS CORPUS

Comes now James A. Lester, Brigadier General, United States Army, respondent herein, through Frank J. Hennessy, United States Attorney for the Northern District of California, and Joseph Karesh, Assistant United States Attorney for the Northern District of California, and for a supplemental return to the writ of habeas corpus issued herein, incorporates the following allegations in the records of this proceeding as a part of the return to writ of habeas corpus heretofore filed herein on January 10, 1949, as though the same had therein been set forth in full:

V.

That respondent is informed and believes and further alleges that all the members of the General Court Martial, among whom was included Major

General William C. Chase, United States Army, and all the personnel of the prosecution, among whom was included Captain Andrew H. Bachison, United States Army, acted fairly and impartially and conducted themselves properly during all stages of the aforesaid General Court Martial proceedings.

/s/ FRANK J. HENNESSY,
U. S. Attorney.

/s/ JOSEPH KARESH,
Assistant U. S. Attorney.
Attorneys for
Respondent.

[Endorsed]: Filed Mar. 28, 1949.

[Title of District Court and Cause.]

ORDER DISCHARGING WRIT

This matter came on to be heard upon a writ of habeas corpus heretofore issued on December 14, 1948, and after a full consideration of all the evidence, both oral and documentary, and the arguments of counsel, it appears to the Court that the court-martial whereof petitioner complains had jurisdiction to try the petitioner and its sentence was within its power to pronounce. It is therefore by the Court

Ordered, upon findings of fact and conclusions of law, that the application of petitioner to be restored to his liberty is Denied; the writ heretofore issued on December 14, 1948, is Discharged; and petitioner is remanded to the custody of the respondent, James

A. Lester, Brigadier General, United States Army,
for service of his sentence.

Dated: June 24th, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed June 24, 1949.

Copy handed to Karesh and one certified to Army
authority. Certified copy mailed to Davis, Attorney
for Petitioner.

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME WITHIN
WHICH TO FILE PROPOSED FINDINGS

It is hereby stipulated by and between Frank J.
Hennessy, Esq., United States Attorney for the
Northern District of California, and James T.
Davis, Esq., attorneys for the respective parties
herein, that the time within which proposed counter-
finding of fact and conclusions of law may be filed
herein is hereby extended to and including the 25th
day of August 1949.

Dated: This 5th day of August, 1949.

FRANK J. HENNESSY, ESQ.,
U. S. Attorney.

By /s/ JOSEPH KARESH,
Assistant U. S. Attorney.

/s/ JAMES T. DAVIS.

Approved:

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed Aug. 8, 1949.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between Frank J. Hennessy, United States Attorney, and James T. Davis, Attorney for the petitioner herein, that the petitioner's time to file proposed Findings of Fact and Conclusions of Law herein is extended from the 25th day of August, 1949, until the 31st day of August, 1949.

Dated: August 25th, 1949.

FRANK J. HENNESSY,
U. S. Attorney.

By /s/ JOSEPH KARESH,
Assistant U. S. Attorney.

/s/ JAMES T. DAVIS,
Attorney for Petitioner.

Approved:

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed Aug. 24, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause having been submitted by the parties hereto, James T. Davis, Esquire, appearing as counsel for petitioner, and Frank J. Hennessy, Esquire, United States Attorney for the

Northern District of California, Joseph Karesh, Esquire, Assistant United States Attorney for the Northern District of California, and Nicholas R. Voorhis, Lieutenant Colonel, JAGC, Office of The Judge Advocate General, Washington 25, D. C., appearing as counsel for respondent, and evidence both oral and documentary having been introduced and the petitioner having been heard in person under a writ of habeas corpus duly issued, and the Court being fully advised in the premises, makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That petitioner is detained by respondent James A. Lester, Major General, United States Army, Commanding General of the San Francisco Port of Embarkation, Fort Mason, California, under and by virtue of General Court-Martial Orders No. 85, Department of the Army, dated April 19, 1948;

II.

That petitioner, then a Colonel in the Army of the United States, was, on May 29, 1947, after trial of thirteen days from April 14, 1947 to May 29, 1947, convicted in Japan by a general court-martial appointed and convened by the Commanding General of the Eighth United States Army of the following offenses:

1. Misappropriation of about five hundred (500) diamonds of a value of about \$84,000, property in the custody of the United States in his charge as

custodial officer for the United States, on or about March 20, 1946, in violation of Article of War 95 (Charge I, Specification 1),

2. Misappropriation of about five hundred (500) diamonds of a value of about \$84,000 in the custody of the United States, on or about March 20, 1946, in violation of Article of War 96 (Charge II, Specification 1),

3. Misappropriation of four (4) diamonds of a value of about \$8,000 in the custody of the United States, on or about January 19, 1947, in violation of Article of War 96 (Charge II, Specification 2),

4. Smuggling about five hundred (500) diamonds into the United States of a value of about \$84,000 without paying customs duty, on or about April 4, 1946, in violation of Article of War 96 (Charge II, Specification 3),

5. Wilful execution of a false United States Customs Declaration knowing it to be false in that he failed to schedule four (4) diamonds of a value of about \$8,000 on or about February 3, 1947, in violation of Article of War 96 (Charge II, Specification 4), and

6. Smuggling about four (4) diamonds into the United States of a value of about \$8,000 without paying customs duty, on or about February 3, 1947, in violation of Article of War 96 (Charge II, Specification 5);

that petitioner was sentenced by said general court-martial "To be dismissed the Service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing

authority may direct for (10) years''; that the record of petitioner's trial was reviewed by the Staff Judge Advocate of the Eighth United States Army and thereafter, on July 15, 1947, the Commanding General of the Eighth United States Army, as reviewing authority, approved the sentence but reduced the period of confinement to eight (8) years; that thereafter, on March 4, 1948, the Board of Review in the Office of The Judge Advocate General of the Army, after considering oral argument and written briefs by counsel for petitioner, in a lengthy written opinion held the record of trial legally sufficient to support the findings of guilty and the sentence and to warrant confirmation thereof; that The Judge Advocate General of the Army, on March 30, 1948, concurred in the opinion of the Board of Review and recommended to the Secretary of the Army that the sentence be confirmed, but recommended that the period of confinement be reduced to five years; that the Secretary of the Army, acting pursuant to and in accordance with Executive Order No. 9556, May 26, 1945, and Article of War 48, on April 15, 1948, confirmed the sentence, but reduced the period of confinement to five years and ordered the sentence as modified, to be carried into execution; that the sentence, as modified, was promulgated in General Court-Martial Orders Number 85, Department of the Army, dated April 19, 1948; that petitioner is now engaged in serving the above period of confinement, as reduced;

III.

That in this proceeding, the petitioner challenges

the legality of his present confinement and alleges that the sentence on trial by court-martial is void and of no effect because:

1. The president of the general court-martial, Major General William C. Chase, failed to disclose as a ground of challenge that as Commander of the First Cavalry Division he had a direct responsibility for the diamonds and precious metals seized from the Japanese Government and its agencies;

2. The president of the court-martial assumed the role of prosecutor which was a denial of due process causing a loss of jurisdiction in the court-martial;

3. Specifications 3, 4 and 5 of Charge II fail to state a public offense;

4. There is no evidence in support of Charge I and its specification or of Specification 1 and 2 of Charge II;

5. The denial of petitioner's motion for a continuance was a denial of due process causing a loss of jurisdiction in the court-martial;

6. Testimony of certain witnesses was perjured, was obtained by duress and coercion which was a denial of due process;

7. Admission in evidence of confessions or admission of the petitioner was error because they were involuntary and were obtained by coercion and compulsion, amounting to a denial of due process of law;

8. Consideration by the Board of Review and The Judge Advocate General of the report of in-

investigation by The Inspector General was in Violation of Article of War 501½ and constituted a denial of due process of law;

9. Investigation by the Trial Judge Advocate during a recess in the trial was in violation of Article of War 70 and was a denial of due process;

10. The totality of errors in pre-trial procedure and during the course of trial together with a failure of proof constituted a denial of the substance of a fair trial to petitioner;

IV.

That, with reference to petitioner's first contention, the court finds that the petitioner and his special defense counsel had full knowledge of the facts concerning the qualification of Major General William C. Chase, United States Army, to serve as President and member of said general court-martial and of the fact that the said Major General Chase had commanded a cavalry division which had seized the Bank of Japan and its contents prior to the time the petitioner had assumed custodial duties incident to the subject matter of the court-martial charges; that the petitioner and his special defense counsel freely, voluntarily, intelligently, intentionally, understandingly and competently did not object to any member of the general court-martial then convened, including the said Major General Chase, and did not challenge any member of the general court-martial either for cause or peremptorily; that there was no conflict in interest between the said Major General Chase and the petitioner;

that the said Major General Chase was not disqualified to serve as President and member of the General court-martial that tried petitioner and that his presence thereon did not prejudice the petitioner's interests or affect the legality of the constitution of the general court-martial, or affect the legality of petitioner's trial, conviction and sentence by said general court-martial;

V.

That, with reference to petitioner's second contention, the court finds that the President of the said general court-martial, Major General William C. Chase, acted properly as such and did not assume the role of prosecutor, as alleged by petitioner; that in endeavoring to bring all available evidence before the general court-martial he properly performed his duty as President of said general court-martial and took appropriate action in compliance with the duties of the court-martial as prescribed in paragraph 75a (page 58) of the Manual for Courts-Martial, U. S. Army, 1928; that the action of the President of the general court-martial, concerning which the petitioner complains did not deny petitioner due process of law or affect the jurisdiction of said general court-martial;

VI.

That, with reference to petitioner's third contention, the court finds that Specifications 3, 4 and 5 of Charge II allege acts and omissions of the petitioner which constitute violations of Article of War 96 (10 U.S.C. 1568); that the general court-martial,

the reviewing authority and the Army appellate reviewing agencies have each ruled on the sufficiency of the pleadings and held them sufficient; that the petitioner was advised by the specifications of the offenses for which he was to be tried and that he was sufficiently apprised of the offenses in order intelligently to admit, deny, or plead specially to them and that he could plead his conviction as a bar to a subsequent prosecution for the same offenses;

VII.

That, with reference to petitioner's fourth contention, the court finds that the findings of guilty by the general court-martial of Charge I and its specification and of Specifications 1 and 2 of Charge II and Charge II were predicated upon abundant evidence before the court-martial; that the determination of the petitioner's guilt or innocence of the offenses charged on the evidence before it is clearly within the jurisdiction of the general court-martial and is not subject to review by this court in a habeas corpus proceeding;

VIII.

That, with reference to petitioner's fifth contention, the court finds that on April 18, 1947, the general court-martial continued petitioner's trial until May 12, 1947; that such continuance was taken on motion of the prosecution, to which the defense stated that it had no objection, with the understanding that when the court-martial reconvened both sides would be ready to proceed; that, in overruling the motion of the defense on May 12, 1947, for a

further continuance of two weeks for the purpose of obtaining a diamond expert to assist defense counsel in conducting cross-examination, and not to obtain a witness as alleged, the general court-martial acted properly in the exercise of its judicial discretion; that thereafter, on May 16, 1947, after the prosecution had rested, the general court-martial granted a continuance of ten days, on motion of the defense, for the purpose of preparing petitioner's defense; that thereafter, on May 26, 1947, a further continuance until May 28, 1947, was granted the defense due to the illness of one of petitioner's counsel; that the action of the general court-martial in granting and denying requested continuances was fair, did not constitute a denial of due process of law to the petitioner and did not affect the jurisdiction of the court-martial or the legality of petitioner's trial and conviction;

IX.

That, with reference to petitioner's sixth contention, the court finds that there is no evidence that perjured testimony was procured or presented by the prosecution in petitioner's trial by court-martial, or that any evidence against the petitioner was procured by duress or by coercion; that the petitioner has failed to sustain the burden of proving that any evidence before the court-martial was perjured, or procured by duress or coercion, or that the prosecution had knowledge of its falsity; the court further finds that the petitioner was not denied due process of law;

X.

That, with reference to petitioner's seventh contention, the court finds that the petitioner was properly informed of his rights, including his rights under Article of War 24 (10 U.S.C. 1495); that petitioner, with full knowledge of his rights, voluntarily, and not being subject to any threats, force, coercion or compulsion, made certain confessions or admissions; that the general court-martial had full authority and jurisdiction to determine the admissibility of petitioner's pre-trial statements; that the admission in evidence by the general court-martial of such confessions or admissions of the petitioner was not error and did not deny petitioner due process of law;

XI.

That, with reference to petitioner's eighth contention, the court finds that counsel for the petitioner presented to the Board of Review and The Judge Advocate General a brief and three affidavits containing allegations which were considered by the Board of Review to be of sufficient gravity as to require investigation into their veracity; that, as a result of such accusations made on behalf of the petitioner, an investigation was initiated by The Inspector General, United States Army, into the truth of the matters set forth in the affidavits and the report of said investigation was submitted to and considered by the Board of Review and The Judge Advocate General; that the petitioner, having brought to the attention of the Board of Review

matters dehors the record and urged that they be considered, is responsible for the action of the Board of Review and The Judge Advocate General in considering the report of investigation of The Inspector General; that the action of the Board of Review and The Judge Advocate General, both in requesting the investigation and considering the report, was not violative of Article of War 50 $\frac{1}{2}$ (10 U.S.C. 1522), was in the interests of justice, and did not deprive petitioner of due process of law;

XII.

That, with reference to petitioner's ninth contention, the court finds that the Trial Judge Advocate interviewed prospective witnesses during a recess in petitioner's trial; that during said interviews, personnel for the defense were at all times at liberty to be present and participate, and did participate occasionally; that the action of the Trial Judge Advocate was in accord with the provisions of paragraph 75a (page 58), Manual for Courts-Martial, U. S. Army, 1928, was not violative of Article of War 70 (10 U.S.C. 1542) with reference to pre-trial investigations, and did not constitute a denial of due process of law to the petitioner;

XIII.

That, with reference to petitioner's tenth contention, the court finds that the petitioner was ably and aggressively defended by effective and competent counsel at his trial by general court-martial;

that petitioner was accorded a full, complete and fair trial; that subsequent to trial, petitioner's allegations concerning the members of the general court-martial and personnel of the prosecution were thoroughly and fairly investigated and properly considered by the reviewing authority and the Army appellate reviewing agencies; that the pre-trial procedure, trial and appellate review proceedings were applied to the petitioner in a fundamentally fair manner; that the petitioner was not denied due process of law;

XIV.

That the petitioner has failed to sustain the burden of proving the allegations of his petition;

XV.

That the petitioner has failed to exhaust the administrative remedies provided by Congress before recourse to this court in a habeas corpus proceeding, in that petitioner has not petitioned The Judge Advocate General for a new trial, or other relief, under the provisions of Article of War 53 (Sec. 230, Title II, Public Law 759, 80th Congress; act of June 25, 1948, 62 Stat. 627) and the procedure established by the President in Chapter XXII of the Manual for Courts-Martial, U. S. Army, 1949.

Conclusions of Law

I.

That the general court-martial that tried the petitioner in Japan from April 14, 1947 to May 29, 1947, was legally appointed by an officer empowered under law to appoint it;

II.

That said general court-martial was legally com-

posed with respect to the number and competency of the officers appointed as members thereof;

III.

That Major General William C. Chase, United States Army, was legally qualified to serve as President and member of said general court-martial and his service thereon did not affect the legality of the constitution of the court-martial, its jurisdiction, or the legality of petitioner's trial, conviction and sentence by said general court-martial;

IV.

That the said general court-martial was invested by statute with the power to try the petitioner and the offenses charged against said petitioner;

V.

That the said general court-martial did not exceed its lawful powers in the trial and conviction of the petitioner;

VI.

That the petitioner has failed to sustain the burden of proving that the President of said general court-martial acted improperly and assumed the role of prosecutor;

VII.

That the President of said general court-martial acted legally and properly and that none of his actions as President and member of said general court-martial during petitioner's trial deprived petitioner of a fair trial or denied petitioner due process of law;

VIII.

That Specifications 3, 4 and 5 of Charge II state offenses in violation of Article of War 96 (10 U.S.C. 1568) ;

IX.

That the said general court-martial had abundant evidence before it upon which to base its findings of guilty of the offenses charged against the petitioner under Charge I and its specification and under Charge II and its specifications ;

X.

That the petitioner's conviction after a full and fair trial before a general court-martial, and the determination of the facts and law in connection with such conviction by the military authorities are not subject to review in a habeas corpus proceeding ;

XI.

That the action of the said general court-martial in denying one of petitioner's motions for a continuance was a matter committed to its sound judicial discretion, did not constitute an abuse of discretion and did not constitute a denial to the petitioner of due process of law ;

XII.

That the sentence adjudged by said general court-martial, as approved and promulgated by the reviewing and confirming authorities, was authorized by law ;

XIII.

That the petitioner has failed to sustain the bur-

den of proving that testimony adduced by the prosecution was perjured and obtained by duress or coercion;

XIV.

That the testimony adduced by the prosecution against the petitioner was not perjured or obtained by duress or coercion;

XV.

That the petitioner has failed to sustain the burden of proving that his confessions or admissions were involuntary or obtained by coercion and compulsion;

XVI.

That the admission in evidence of petitioner's confessions or admissions was a matter committed to the sound judicial discretion of said general court-martial, did not constitute an abuse of discretion and did not constitute a denial to the petitioner of due process of law;

XVII.

That consideration by the Board of Review and The Judge Advocate General of the report of investigation by The Inspector General, initiated as the result of the presentation by the petitioner of certain accusations, was a valid exercise of the review authority vested in said officers by law, did not constitute a violation of Article of War 50½ (10 U.S.C. 1522) and did not constitute a denial to the petitioner of due process of law;

XVIII.

That the investigation conducted by the Trial Judge Advocate during a recess in the trial was a

lawful exercise of the authority vested in said officer, was not in violation of Article of War 70 (10 U.S.C. 1542) and did not constitute a denial to the petitioner of due process of law;

XIX.

That the petitioner has failed to sustain the burden of proving that he was denied due process of law before said general court-martial;

XX.

That the petitioner was not denied due process of law before said general court-martial;

XXI.

That the petitioner has failed to sustain the burden of proving that he was denied any of his constitutional rights before the said general court-martial;

XXII.

That the petitioner was not denied any of his constitutional rights before the said general court-martial;

XXIII.

That there is no merit to the petition for writ of habeas corpus on file herein;

XXIV.

That petitioner is now in the lawful custody and control of the respondent and is not now entitled to his discharge.

Dated: this 1st day of September, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed Sept. 1, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Edward Jackson Murray, Petitioner in the above entitled proceeding, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the Honorable Michael J. Roche, United States District Judge for the Northern District of California, discharging the Writ of Habeas Corpus, in the above entitled proceeding, effective on September 1, 1949.

Dated: This 29th day of September, 1949.

/s/ JAMES T. DAVIS,
Attorney for Petitioner.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 29, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY UPON
APPEAL

1. That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, should have granted the petition for writ of habeas corpus filed by appellant before him.
2. That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, erred when he ordered the writ issued December 14, 1948, discharged.

3. That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, erred when he ordered appellant remanded to custody.

4. That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, erred when he found that the General Court-Martial by which appellant was convicted had jurisdiction to try and sentence appellant.

5. That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, erred when he found that appellant was not denied due process of law.

6. That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, erred when he found that the appellant failed to sustain the burden of proving the allegations of his petition.

7. That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, erred when he found that the petition failed to exhaust the administrative remedies provided by Congress.

8. That the Honorable Michael J. Roche, United States District Judge for the Northern District of California, erred when he found that the determination of the facts and law in connection with such conviction by the military authorities are not sub-

ject to review in a habeas corpus proceeding.

Dated: This 29th day of September, 1949.

/s/ JAMES T. DAVIS,

Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 29, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75(a)

Edward Jackson Murray, Petitioner-Appellant herein, hereby designates the complete record and proceedings in the above-entitled cause, including all exhibits, for inclusion in the record on appeal.

Dated: This 20th day of September, 1949.

/s/ JAMES T. DAVIS,

Attorney for Petitioner-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 29, 1949.

[Title of District Court and Cause.]

ORDER RE: EXHIBITS ON APPEAL

Good Cause Appearing Therefor, it is hereby Ordered that Exhibits Nos. 1-A, 1-B and 2 in the above captioned matter may be sent to the Court of Appeals for the Ninth Circuit in their original

form and in such form may be considered a part of the Record on Appeal.

Dated: October 10th, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

[Endorsed]: Filed Oct. 10, 1949.

In the Southern Division of the United States District Court for the Northern District of California

No. 28431-R

In the Matter of the Application of EDWARD JACKSON MURRAY, for a Writ of Habeas Corpus.

Before: Hon. Michael J. Roche,
Judge.

Appearances:

JAMES T. DAVIS, ESQ.,

For the Applicant.

JOSEPH KARESH, ESQ.,

Assistant U. S. Attorney,

For the Respondent. [1*]

HEARING ON THE APPLICATION

Monday, March 28, 1949

The Clerk: In the matter of Edward J. Murray, Habeas Corpus.

Mr. Karesh: Ready.

Mr. Davis: Ready.

The Court: Proceed, gentlemen.

Mr. Karesh: May it please your Honor, this case was continued until this morning by stipulation

* Page numbering appearing at top of page of Reporter's original Transcript of Record.

of counsel, and at this time we ask leave to file a supplemental return to the writ of habeas corpus on behalf of the respondent, Brigadier General James A. Lester, of the United States Army. I think there is no objection.

Mr. Davis: There is no objection, and may it be stipulated, your Honor, that our petition and amended petition be considered the traverse to this return?

Mr. Karesh: That is agreeable.

The Court: Let the record so show.

Mr. Karesh: I have served a copy of the supplemental return and the writ on Mr. Davis and the petitioner, your Honor. Mr. Murray has been produced again by General Lester, the respondent.

Mr. Davis: If it please the Court, this is a petition for writ of habeas corpus on the part of Edward Jackson Murray. I worked on this matter for many months, your Honor, and I have raised several points in my petition, some of which are factual and some of which are legal. I am confident and satisfied [2] myself that it would be impossible for your Honor to properly evaluate the petition without having the entire record of the trial available to you because of the various points which have been raised. On the other hand, your Honor, I realize it would be an imposition upon the court and would necessitate a great deal of time to read portions of the record, or the entire record, which are completely immaterial to our position here. It is my suggestion, and I made this suggestion to Mr. Ka-

resh, that we do the following, that we offer the entire record——

Mr. Karesh: You mean the petitioner offers?

Mr. Davis: The petitioner offers the entire record of the trial, which includes the trial and the proceedings before the Board of Review, and the investigation—the entire trial up until the actual confirmation of the sentence by the Secretary of War, with the understanding that I will then write a brief in support of the points raised in my petition, calling your Honor's attention to the specific portions of the record which your Honor would have to consider, and then Mr. Karesh, of course, would counter in his brief, and if there is any contradiction in the record, call your Honor's attention to those portions of the record in our argument upon the law. I am firmly convinced, your Honor, that due to the points I have raised and their nature, that it would be impossible for your Honor to consider the matter properly and investigate [3] it fully without having that record available to your Honor. So with that in mind, your Honor, at this time I offer the entire record of the trial of Colonel Edward J. Murray, first a photostatic copy of the record of trial by general court martial convened at Yokohama from April 14 to May 29, 1947, as Exhibit 1-A.

Mr. Karesh: Together with the accompanying papers—would you read the rest of it?

Mr. Davis: I will read the certification:

“I hereby certify that the attached is a photostatic copy of the record of trial of Colonel Edward

J. Murray, O166578, by a general court martial which convened at Yokohama, Japan, 14 April to 29 May, 1947, together with accompanying papers, official copy of general court martial orders No. 85, Department of the Army, dated 19 April, 1948, Opinion of the Board of Review, dated 4 March, 1948, and First Endorsement of The Judge Advocate General, dated 3 March, 1948, on file in the office of the Judge Advocate General."

That is Exhibit 1-A.

The Court: There is no objection?

Mr. Karesh: There is no objection, your Honor. Perhaps it is immaterial, but since there has been such a contention made, a strong contention, that the trial was not fair, and we believe it was, it might as well go in.

The Court: It will be admitted and marked. [4]

(The record referred to was thereupon received in evidence and marked Petitioner's Exhibit 1-A.)

Mr. Davis: We offer as Exhibit 1-B the following record, of which I will read the certification:

"I hereby certify that the attached is a photostatic copy of the report of investigation made by the Office of the Inspector General, General Headquarters, Far East Command, together with accompanying papers concerning allegations in the trial by general court martial of Colonel Edward J. Murray, O166578, on file in the office of the Inspector General."

We offer that as Exhibit 1-B.

Mr. Karesh: I may say this, your Honor, while the appeal is not part of due process, none the less we will have no objection to the offer of the report of the investigation by the inspector general, which will be designated 1-B.

(The record referred to was thereupon received in evidence and marked Petitioner's Exhibit 1-B.)

Mr. Karesh: I think it is stipulated, is it not, Mr. Davis, that there are certain affidavits in 1-B, and that these affidavits may be considered as though they had been taken at this time for purposes of this habeas corpus hearing, is that correct?

Mr. Davis: That is true, your Honor.

Mr. Karesh: Is that agreeable, your Honor? [5]

The Court: Very well.

Mr. Davis: So stipulated.

If the Court please, at this time I wish to offer an affidavit of one Ralph S. Johnston, in connection with this matter, and ask permission to read it into the record.

Mr. Karesh: Ordinarily, your Honor, we might object to an affidavit being offered in evidence because it does not give us an opportunity to cross-examine, but we believe that will be adequately taken care of by the affidavits in Petitioner's Exhibit 1-B, so we will not object to the affidavit of Major Johnston, which under the new rules is within the discretion of the court to receive.

Mr. Davis: Yes, your Honor, under the new rules

it is within the discretion of the court to accept an affidavit. I might point out, of course, we can't produce this Ralph S. Johnston. On the other hand, I also point out he is still a member of the Army, and if they wish to confront him, they can produce him.

The Court: It will be admitted and marked.

(The affidavit referred to was thereupon received in evidence and marked Petitioner's Exhibit 2.)

Mr. Davis: May I read it into the record?

"State of New Jersey,
County of Monmouth—ss.

"Ralph S. Johnston, being duly sworn, deposes and [6] says: I am a Major, Officers' Reserve Corps, Army of the United States; that I was defense counsel for Colonel Edward J. Murray, Inf., AUS, during his trial 14 April-29 May, 1947, by court martial convened at Yokohama, Japan.

"At about 10:15 on the morning of 17 April, 1947, after the court had denied several of my motions for acquittal of Colonel Murray under certain charges and specifications, the court took a short recess. The members of the court upon this occasion retired to the anteroom reserved for their use in the courthouse. Before entering this room, the president of the court, Major General Chase, asked Captain Bachison to step into the room with the members of the court. Although I was not invited

to go into the room along with Captain Bachison, I did enter it immediately without invitation.

“As soon as we had entered this anteroom, Gen. Chase addressed Capt. Bachison and asked him, ‘Have you done everything you can do?’ Capt. Bachison answered in the affirmative. Gen. Chase then said, ‘This will never do.’ Gen. Chase then picked up the telephone in the anteroom and became connected with the Office of the Civil Property Custodian. He then asked to speak with Brigadier General Patrick H. Tansey, who was the Civil Property Custodian. When he was connected with Gen. Tansey, Gen. Chase said, as nearly as I can remember the exact [7] words, as follows: ‘Tansey, this is Chase, down in Yokohama. The prosecution has just rested. Is there anything that your office can do to gather more evidence to help us get a conviction?’ After a considerable pause, General Chase then said into the telephone, ‘Is that so. Do you think you can? Can you get those people down here right away?’ After another short pause, Gen. Chase then said, ‘All right. Then we’ll recess until they can get here.’ That closed this conversation.

“The following day, 18 April, 1947, upon motion of the prosecution a continuance was granted until 12 May, 1947; that during said continuance deponent made every effort to find in Japan an impartial diamond expert to assist in the cross-examination of the government’s witnesses, whom he was advised would attempt to identify some Murray diamonds as having been purchased by Koeki-Eidan,

and to testify for the defense; that he finally located such an expert in Shanghai; that upon the reconvening of the court on 12 May, 1947, he made a motion for a continuance of two weeks in order to procure the attendance of this necessary witness but this motion was denied, and defense was compelled to proceed without the assistance of this necessary witness; that during the extended recess of the court 18 April-12 May and several days before its reconvening 12 May, the exact date being unknown to me but I [8] believe Thursday, 8 May, 1947, while I was entertaining several guests at my home, House 504A, Yokohama, between 8:30 and 9:00 o'clock in the evening, Captain Andrew H. Bachison, Trial Judge Advocate in the case of Col. Edward J. Murray, called at my home to pick up a volume of the U. S. Code Annotated, which was used by both of us in the trial. Upon this occasion, I invited Capt. Bachison to stay a while with us as he had previously met several of my guests. Capt. Bachison did remain under these circumstances about an hour. During the course of our conversation, he and I talked about his work in attempting to trace the diamonds comprising Exhibit 1 in the trial record from Koeki-Eidan to the custody of the United States Government. Capt. Bachison told me of the progress he had made in interviewing Japanese diamond dealers and representatives of Koeki-Eidan by stating either in these words or in words closely similar that, 'I have finally got these men to say what I want them to

say.' Then he added, 'I have certainly had to sweat them out,' and 'even at that, I am not so sure about their standing up when they actually appear as witnesses.' I gathered from these statements of Capt. Bachison that he had subjected these prospective witnesses to great pressure and influence amounting to duress to force them to identify certain of the diamonds which comprise Exhibit 1. [9]

"The quoted conversation of Capt. Bachison was had before all persons in the living room in my home at that time. These people included Mr. F. C. Taylor, general manager, American Trading Company, 51 Canton Road, Shanghai, China, who was at that time serving with SCAP in Japan as civilian textile adviser; Capt. Charles Thompson, MAC, AUS, assistant port surgeon, Second Major Port, APO 503, and Capt. Thompson's wife, Mrs. Beverly Thompson; Mr. Edward E. Flaherty, assistant vice consul of the United States at Yokohama, and Mr. Flaherty's wife, Mrs. Joan Flaherty; and First Lieutenant Robert Jackson Crook, FA, AUS, 8th Army Officers Club, Special Service Section, 8th Army, APO 343.

/s/ "RALPH S. JOHNSTON."

And sworn to by a notary public of the State of New Jersey.

Mr. Davis: If the Court please, this is an affidavit which I believe is already in the record before the Inspector General. In other words, this Japanese, Matsui, gave an affidavit at some date prior to this, which is in the record. Then he gave

certain testimony to the inspector general of the Army. But he has now given a current affidavit, on the 18th of November, 1947, before the United States Vice Consul for Tokyo, Japan.

Mr. Karesh: That would clutter the record, your Honor, as I understand it. It is in this Exhibit 1-B. We do not [10] need to put it in again.

The Court: The subject-matter you are dealing with there is in the record?

Mr. Davis: It is in the record already. This is just a reiteration of it, your Honor.

Mr. Karesh: We will object to its offer.

The Court: The objection will be sustained.

Mr. Davis: I believe the same would apply to an affidavit. However, I will offer it. It is the affidavit of Mr. F. C. Taylor, which was taken on the 18th of March, 1949, before the Vice Consul in Yokohama, Japan. This affidavit is also in the record.

Mr. Karesh: We will object, your Honor, that it merely clutters up our proceedings here. It is already in Exhibit 1-B, Mr. Davis informs me. There is no use of putting it in here.

The Court: The same ruling. The objection will be sustained.

Mr. Davis: If the Court please, at this time I wish to offer in evidence the affidavit with the attached documents of Ralph S. Johnston again. This is taken before a notary public in the State of New Jersey, County of Monmouth. I respectfully call your Honor's attention to the portion of Major

Johnston's affidavit which refers to the actions of Captain Bachison in stating that he had sweated out the witnesses.

Mr. Karesh: I will object to this, if it please the Court, for the reason that no proper foundation has been [11] offered for the admission of the attached affidavits. Clearly, Mr. Johnston does not know anything about them. He says, "These interrogations were held at the offices of the Civil Property Custodian, and the copies attached hereto were handed to me at my request by the Office of the Civil Property Custodian."

The Court: That is a portion of the affidavit, if I followed your language.

Mr. Karesh: They are only a part. They are not complete. For that additional reason we voice an objection. Of course, no proper foundation has been offered for their admission. There is no showing that these affidavits were actually on file with the Office of Civil Property Custodian, and I think this record before the inspector general will suffice. We will voice a vigorous objection to these affidavits.

Mr. Davis: In the first place, Mr. Karesh, they are not affidavits.

Mr. Karesh: Well, statements. They purport to be a part of the record of the interrogation of Bachison and these witnesses.

Mr. Davis: Now, Mr. Karesh's objection, as I see it, your Honor, merely goes to the weight of the testimony, not to its admissibility. Mr. Ralph

Johnston says these are copies of interrogations made before the Civil Property Custodian, and they were given to me by Major Priman. That merely goes [12] to the weight. He does not say they are true or not true. He merely says these are parts of the record handed to me by Priman.

Mr. Karesh: Your Honor, they are not under oath.

Mr. Davis: They do not purport to be. They purport to be a transcript of testimony which was taken at a hearing.

Mr. Karesh: We do not know whether that was actually taken, or not, and we offer the objection, your Honor. Here is something that allegedly took place before the Civil Property Custodian, and we say it is clearly immaterial and objectionable, and no foundation has been laid for its introduction.

The Court: Submitted?

Mr. Davis: Yes.

The Court: The objection will be sustained.

Mr. Davis: If the Court please, I will ask permission to call the petitioner.

EDWARD JACKSON MURRAY

called as a witness in his own behalf; sworn.

The Clerk: Will you state your name?

A. Edward Jackson Murray.

Direct Examination

By Mr. Davis:

Q. Mr. Murray, what is your age, please?

A. I am 57. [13]

(Testimony of Edward Jackson Murray.)

Q. Prior to this court martial that we are considering here today you were an officer in the United States Army, is that correct?

A. Yes, that is right.

Q. What was your rank?

A. Colonel, Colonel of Infantry.

Q. Will you tell the Court briefly what your military history has been? I mean what branch of the service have you been in?

A. I have always been in the infantry. I enlisted in the California National Guard in 1914. My service has been practically continuous in the National Guard. However, all of it has not been active duty in Federal Service. I served on the Mexican border in 1916, Federal Service; also in the First World War, in the United States, in England, and in France. After the First World War my service, of course, inactive, in the California National Guard until the Second World War, or, rather, March 1, 1941, when the National Guard was called into Federal Service, supposedly for one year's training. At that time I was a Colonel in command of an infantry regiment. Then I served as a regimental commander from that date until February, 1945. At that time we were in the Philippines, and I was appointed military government officer for the 40th Division on that date. We moved down into the Southern Philippines and we landed on the Island of Panay, and after taking that island the division reinforced moved over

(Testimony of Edward Jackson Murray.)

to Negroes, and I was left in command [14] of the Island of Panay, from which point I had to supply the reinforced division. I had to maintain order. I had the duty of appointing some 300 supply officers, ranking from three provisional governors down to baria mares. I also had a battalion of construction engineers there with which I built two air strips, reconstructed 125 kilometers of railroad; I had a battalion of infantry with which we kept what Japs were left on the island—about 200 it turned out after the surrender—we kept them back in the hills.

Q. In other words, Colonel, when you were in active duty, both in the First World War and in the Second World War, and on the Mexican border, you were a combat officer, is that correct, and you were not an administrative officer?

A. Yes, that is true. I was an infantry officer all the time. I had some administrative work, yes, but my main mission was not that. [15]

Q. In the period of time between the First World War and the Second World War you were in inactive status. What was your position?

A. I was an engineer. Most of that time I spent in the employ of the State of California, first with the Reclamation Board, and then with the California Highway Commission. I was in the Bridge Department.

Q. What was your educational background?

A. My educational background was only high school, as far as actual schooling is concerned.

(Testimony of Edward Jackson Murray.)

I left high school and went to work when I was 18 in a bank. While in the bank I studied mathematics and engineering at night and I left the bank to go work as an engineer. I took a course from the International Correspondence Schools in civil engineering. I spent five years studying that. Later I took a University Extension course by the University of Wisconsin. I also took a special course in structural design in Sacramento at a special school that was running there.

Q. Tell me, after you were transferred to Japan from the Philippine Islands, you were placed in charge, you were placed in a position in charge of the bank vaults of the Bank of Japan; is that true?

A. In charge of four vaults which the 8th Army had taken over, in the Bank of Japan, yes.

Q. Do you know of your own knowledge which division or branch [16] of the Army had been in charge of these vaults immediately prior to the time that you took them over?

A. Well, immediately prior to the time I took over from Colonel Shoemaker who was in charge there, either three or four days after he had taken over from some representative of the First Cavalry Division.

Q. Do you know approximately how long the First Cavalry Division had charge or custody of these vaults?

A. I do not know exactly. I heard that from

(Testimony of Edward Jackson Murray.)

the—well, up to the time we took over, which was in November of 1945—I couldn't tell you exactly.

Q. In any event, they were in charge up until the third or fourth day before Colonel Shoemaker took over and then you took over from him?

A. Correct.

Q. Do you know of your own knowledge the name of the commanding officer of the First Cavalry Division at that time?

A. Yes; Major General William Chase.

Q. Was it the same General Chase who was president of your court martial?

A. The same man.

Q. At the time when the court martial was appointed, did you know at that time, or did it recall itself to your mind that the General Chase who was sitting as president of your court martial was the same General Chase who had had custody of the [17] vaults prior to that time?

A. Well, I knew it, of course, in the back of my mind, but it made no impression on me. I didn't connect the two parties.

Q. Will you tell us briefly what was the general condition there in the bank as far as the condition of the property that you had in these vaults?

A. You mean when I first went there?

Q. Yes; when you took over.

A. Well, the condition of the property in the vaults was rather—well, it was, I would say, chaotic. The impression I got on going in there and

(Testimony of Edward Jackson Murray.)

looking at it was, they backed trucks up to the door of each vault and just shoveled stuff out into it.

Q. What type of property was in there?

A. It was all——

Mr. Karesh: I object to the question on the ground that this line of testimony is immaterial; whether there was or was not evidence before the court is not cognizable in habeas corpus.

Mr. Davis: I am not introducing it for that purpose, at all. I am introducing it for the purpose of showing and in support of my allegations in my petition just briefly what the condition was there, what he was doing.

The Court: For that limited purpose I will allow it.

Q. (By Mr. Davis): Would you say that there were valuables of all types in there, for example, jewelry, all types of [18] valuables, but they were not segregated or in separate compartments, or anything like that; they were just there, as you say, in a chaotic condition?

A. Well, some were—in those vaults was a tremendous number of gold and silver ingots. Those items were pretty well taken care of. They were large, heavy things, and they were in pretty good shape, but other stuff that had been brought in there in the shape of all kinds of commercial and industrial precious metals; the electrical industry, for example, there would be a tremendous lot of silver and platinum wire. There was all kinds of

(Testimony of Edward Jackson Murray.)

that sort of stuff. Then there were a tremendous number of rayon spinnerettes, thousands and thousands of them. They are about 50 per cent gold and 50 per cent platinum. There were all kinds of—there was probably a ton of platinum in various shapes, castings and so on.

The Court: What is a rayon spinnerette?

A. They use that in their spinning, when they make rayon; they take cellulose and put it in a vat with chemicals and turn it into rayon. Then they run it through the spinnerettes, they have very fine holes; it dries as it comes out, they put it on their spinnerettes and dry it out.

The Court: Proceed.

A. That condition, that is what we found in the bank there. It was simply a fact that the stuff was coming in there too fast for them to take proper care of. I can't say anyone is to [19] blame for that condition. At that time it could not have been anything else; I don't see how it could. Our job when we went in there was to straighten it out and make an inventory.

Q. (By Mr. Davis): After these charges were made against you do you recall an occasion when you were interrogated by a Colonel Hood, the inspector general of the 8th Army?

A. Yes.

Q. Do you recall where that interrogation took place?

A. That took place at the 8th Army stockade in Tokyo.

(Testimony of Edward Jackson Murray.)

Q. Who, if anyone else, was present at the time of that interrogation?

A. There was Captain Currier, of the Judge Advocate General's Department, and Colonel Hood; Colonel Hood had brought him as his attorney; Lieutenant Colonel Gorman, of the Judge Advocate General's Department of the 8th Army also.

Q. What period of time did that interrogation take?

A. It started at approximately one o'clock in the afternoon and ended about six that evening.

Mr. Karesh: Lay the foundation of time.

Q. (By Mr. Davis): Do you recall what day this was?

A. No, I don't. It was in February of 1947, after I had been confined in the 8th Army stockade.

Q. At the hearing——

The Court: What date were you confined?

A. 18th of February. [20]

The Court: What date did this hearing take place?

A. I don't know the exact date.

The Court: Approximately?

A. It was about a week later, it seems to me.

Q. (By Mr. Davis): About a week later. Where did you say it was, in the stockade?

A. In the stockade.

Q. These men whom you have mentioned were present and yourself? A. Yes.

(Testimony of Edward Jackson Murray.)

Q. At the outset of this interrogation did you make any statement to Colonel Hood to the effect that you wished to be represented by an attorney?

A. Yes.

Q. What, if anything, did he say to you?

A. He told me in that kind of inquiry I was not entitled to counsel.

Q. After he made that statement, did you then proceed to answer certain questions which he put to you? A. I did.

Q. Going now to the actual court martial, do you recall the episode in the court martial when your counsel requested a continuance for the purpose of securing a commercial diamond expert to assist in the cross-examination of the prosecution witnesses? A. Yes, I do. [21]

Mr. Karesh: The record speaks for itself. I don't think counsel should impeach it.

Mr. Davis: I am not attempting to impeach it. I am merely attempting to support it.

Q. You do recall your counsel asking for a continuance, do you not? A. Yes.

Q. Was it granted? A. It was not.

Q. Finally, Colonel, did you upon one occasion here when you were examined by Customs Agents have four diamonds in your watch pocket; is that correct? A. Yes.

Q. Were those part of the original diamonds which you had brought here on a previous occasion?

Mr. Karesh: Will you fix the time?

Q. (By Mr. Davis): Do you recall when this took place, what day it was?

(Testimony of Edward Jackson Murray.)

A. On the 3rd day of February, 1947.

Q. Where did it take place?

A. Here in San Francisco.

Q. Down on the dock, or where, the Customs House?

A. The interrogation?

Q. Yes.

A. The interrogation was at the Customs House, yes. [22]

Q. Who was present other than yourself?

A. Oh, there were several customs agents there; Mr. Smith was conducting the investigation. There was also a CID agent from the Army there by the name of Graff.

Q. At the time you turned over to them four diamonds which you had in your pocket; is that correct?

A. I turned the diamonds over to them aboard the ship before we went up to the Customs House.

Q. Were those part of the same diamonds which you had originally brought in?

A. They were, yes.

Q. And you had brought four of them back to Japan?

A. That's right.

Q. You had brought them back to this country again?

A. Yes.

Mr. Davis: I believe that is all.

The Court: We will take a recess now.

(Recess.)

Cross-Examination

(By Mr. Karesh):

Q. Colonel Murray, during the course of the

(Testimony of Edward Jackson Murray.)

direct examination by your counsel, Mr. Davis, you mentioned certain diamonds that the customs officials had taken. Were those diamonds that you brought back from Japan?

A. The ones he referred to were, yes.

Q. Had you declared them with the customs?

A. I had them with me when I came here in 1946. When I left to go back to Japan I still had those four diamonds in my pocket. I took them back with me and I brought them back in 1947, and I gave them to them aboard ship; they did not take them away from me.

Q. How did they happen to take them away from you?

A. They did not take them away from me.

Mr. Davis: I object to that question.

Q. (By Mr. Karesh): Well, explain how they happened to find these diamonds.

A. They did not find them. I will explain to you——

Q. Will you explain the circumstances, yes, how you gave them to them.

A. Yes. They said they had information that I had smuggled diamonds into the United States. That was when I walked down the gangplank of the ship; I was met at the gangplank, Mr. Smith and the CID official, Mr. Graff—this was on the 3rd day of February, 1947. Customs Agent Smith told me that he was going to search men, and asked

(Testimony of Edward Jackson Murray.)

me if I agreed to be searched. I said yes. So we went back aboard ship, went into the cabin that I had occupied, and I took everything out of my pockets. I gave them to them and gave them these four diamonds that I had in my pocket in addition to the other things I had.

Q. Where was Mr. Smith at the time that he first accosted you? [24]

A. He was at the foot of the gangplank.

Q. When you came down the gangplank you had this conversation with him, and he took you back, and you agreed to let him search you, and he found the diamonds; is that right?

A. I gave him the diamonds.

Mr. Davis: I object to the form of the question.

The Witness: I gave them to him.

Q. (By Mr. Karesh): You did not give them to him when you came down the gangplank?

A. No.

Q. You were tried before the court martial, am I correct, for allegedly smuggling in these diamonds that you say you gave to the customs officials?

A. Yes.

Q. You were also tried in addition to the smuggling charge for having other diamonds; that's right, isn't it? A. Yes.

Mr. Karesh: That is all.

Mr. Davis: That is the petitioner's case at this time, your Honor. As I say, the points raised by the petition will necessitate a studious examination

of the record in an attempt to point out to your Honor the various portions of the record which substantiate the allegations of the petition. I would suggest that we have sufficient time to brief that. What do you think, Mr. Karesh? [25]

Mr. Karesh: Well, I want to put on some witnesses.

Mr. Davis: I am merely closing my case at this point, and would like to make arrangements for putting in the brief on the other points.

Mr. Karesh: Sure; that is fine. We will put one in, ourselves, in reply, if your Honor will permit it. First, we would like to put on our witnesses.

The Court: Proceed.

Mr. Karesh: You have rested, with the exception of the brief?

Mr. Davis: With the exception of the brief and calling his Honor's attention to the specific portions of the record that we rely upon, and, of course, the argument.

WILLIAM C. CHASE

called as a witness on behalf of the respondent; sworn.

The Clerk: Will you please state your name?

A. Major General William C. Chase, United States Army.

Direct Examination

Mr. Karesh: Before I interrogate the witness I may say that he was interrogated by the inspector general and his testimony in answer to this con-

(Testimony of William C. Chase.)

tention by Major Johnston, an affidavit by General Chase was put in the record. With your Honor's permission we would like to ask a few questions as to his background. [26]

The Court: Proceed.

Q. (By Mr. Karesh): General, you are a member of the regular Army of the United States?

A. I am.

Q. Are you a graduate of West Point?

A. I am not. I graduated from Brown University, Providence, Rhode Island.

Q. When did you graduate? A. 1916.

Q. When did you first go into the armed forces?

A. I went into the armed forces first as a private in the Rhode Island National Guard in 1913.

Q. Thereafter did you enter the Regular Army?

A. Went into the Regular Army in 1916, just prior to the First World War.

Q. Did you apply for a commission as a result of your prior service in the National Guard?

A. Correct.

Q. What rank were you given?

A. I was a second lieutenant in the Regular Army, November, 1916.

Q. Did you serve in the First World War?

A. I served through the entire World War with the 4th infantry division.

Q. What rank did you have during the First World War? [27] A. I was a captain.

(Testimony of William C. Chase.)

Q. Have you served continuously in the United States Army since your original entry?

A. Indeed, I have.

Q. At the present time you are a major general; is that right? A. Correct.

Q. Is that a temporary rank, or is that a permanent rank?

A. That is a permanent rank of major general.

Q. Did you serve during World War II?

A. I did.

Q. Before I go into your service in World War II, where are you stationed now?

A. I am on duty in the headquarters of the Third Army at Ft. McPherson, which is in Atlanta, Georgia.

Q. How long have you been stationed there?

A. I just arrived there. I hadn't been there 48 hours when I was ordered back here. I just returned from Tokyo to Atlanta.

Q. You mean you were ordered back here for the purpose of this trial, and then you will go back?

A. Yes.

Q. Are you chief of staff?

A. No, I am not now, but I will be when the present incumbent is transferred to Europe.

Q. Will you then be chief of staff of the Third Army with headquarters at Atlanta? [28]

A. That is correct.

Q. Did you serve all through World War II?

A. Yes.

(Testimony of William C. Chase.)

Q. In what capacity?

A. I served as regimental commander, commanding 113th Cavalry Regiment.

Q. What do you mean by regimental commander?

A. A colonel commanding a regiment. I was promoted to brigadier general, First Cavalry Division, in which I served in Australia, New Guinea, the Admiralties and on Luzon. I was promoted to major general and assigned to command the 38th Infantry division, which I commanded for six months on Luzon. Then I was sent back to the 1st Cavalry Division, and commanded the 1st Cavalry Division from the 1st of August, 1945, continuously until the 12th of February this year, when I was transferred back to the States.

Q. During the war you were in much combat?

A. Yes, I was all the time.

Q. Did you participate in the Philippine reconquest?

A. Yes, I did.

Q. In what capacity?

A. I commanded the 1st Cavalry Brigade, a subordinate unit of the Cavalry Division, in the assault landing on Leyte; through the campaign on Leyte. Then we went up to Luzon, and I commanded units of that brigade. [29]

Q. You are wearing a combat badge?

A. Yes.

Q. And the decoration on the left is——

Mr. Davis: If the Court please, I have not ob-

(Testimony of William C. Chase.)

jected as yet, but I think we are getting far afield. I don't think we are interested in the record of either one of these men.

The Court: Well, you developed the record of your client.

Mr. Davis: I did not develop anything about decorations, your Honor, which I could have done if I wished. I don't think it is pertinent.

Mr. Karesh: You said Colonel Murray was a combat man. We will show this gentleman was also a combat man, and that usually combat men have a feeling for each other.

The Court: Proceed.

Q. (By Mr. Karesh): What is that decoration on the left?

A. This is what is known as Distinguished Unit Citation.

Q: That is given to the unit?

A. Yes, by the War Department, for exceptional bravery in action.

Q. You have the Distinguished Service Cross?

A. Yes.

Q. And you have other decorations?

A. Yes.

Q. Did you participate in the trial as a member of the general court martial which convicted Colonel Murray?

A. Yes; I was president. [30]

Q. President of the court? A. Yes.

Q. What is the duty of the president of the court?

(Testimony of William C. Chase.)

A. He is the senior officer of the court, conducts the court.

Q. You do not make the rulings on law, however?

Mr. Davis: If your Honor please, I object to this line of testimony. The general's opinion as to his duties as president of the court martial are certainly incompetent, irrelevant and immaterial in this proceeding. It is a matter of law, what his duties are.

Mr. Karesh: Well, I merely wanted to show your Honor the background of the court martial. However, we will withdraw the question.

The Court: While I was sitting here silently it occurred to me, as perhaps it has to you, I don't know what some of us have done here at home when I see such men as these. With that thought, we will proceed.

Mr. Karesh: Will you have any objections if I ask him the duties of the court?

Mr. Davis: I think it is incompetent, irrelevant and immaterial.

The Court: I will allow it.

Q. (By Mr. Karesh): What are the duties of the president of the court martial, distinguished from the law member?

A. The law member, your Honor, renders decisions on points of [31] law. The president presides and opens and closes the court, and conducts the discussions in closed sessions. The man who renders the decisions on law is the law member,

(Testimony of William C. Chase.)

who, in this case, was Brigadier General Edward Brown.

Q. Do you remember how many members of the court there were which tried and convicted Colonel Murray?

A. Indeed; there were nine. The prosecution challenged General Smith peremptorily and he was dismissed. That left eight.

Q. There were eight men who passed judgment upon Colonel Murray? A. That is correct.

Q. What was the rank of the least ranking officer who sat on the court martial?

A. He was a full colonel who was senior to the accused, had more service than the accused. All the members of the court held more service and were senior in rank to the accused.

Q. In other words, a major at that time could not participate in the trial of a colonel?

A. That is correct.

Q. You say there was a colonel who was senior to Colonel Murray?

A. That is correct; Colonel Easterday, who was the junior member of the court, and was senior to Colonel Murray.

Q. At the time you became a member of the court you took an oath under the Articles of War?

A. Correct.

Q. I think that was taken under Article IX. I will ask you [32] whether this is not the oath which you took at the trial of Colonel Murray——

(Testimony of William C. Chase.)

Mr. Davis: I don't think it is competent on cross-examination, your Honor.

The Court: I took an oath, myself, but it has nothing to do with it.

Mr. Karesh: There has been a challenge to the integrity of General Chase. I think it proper to show the oath he took.

The Court: Proceed.

Mr. Karesh: This is the oath you took, General Chase:

"I do swear that I will well and truly try and determine, according to the evidence, the matter now before me, between the United States of America and the person to be tried, and that I will duly administer justice, without partiality, favor or affection, according to the provisions of the Rules and Articles for the government of the Armies of the United States, and if any doubt should arise, not explained by said articles, then according to my conscience, the best of my understanding, and the custom of war in like cases; and I do further swear that I will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will I disclose or discover the vote or opinion of any particular member [33] of the court martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law; so help me God!"

(Testimony of William C. Chase.)

You took that oath?

A. That is the oath I took, and all members of the court.

Q. In other words, the IXth Article, the oath that you took, General Chase, which says that you are not permitted to disclose the vote of the court unless a court of justice requires it in due course of law; that is right? A. That is correct.

Q. This being a court of law, I will ask you that question: Will you divulge to the court the vote of the members of the court?

Mr. Davis: I object, your Honor. The vote of the court martial is obviously incompetent, irrelevant, and immaterial on a habeas corpus proceeding. I cannot see that it would have any merit other than an attempt to influence this court in ruling upon the petition. We don't care whether they voted unanimously, or not.

Mr. Karesh: It seems to me the petitioner is attacking General Chase. He says he was partial and he was unfair, he was biased. Assume for the sake of argument only, since we do not believe that the evidence would justify that conclusion, but assume he was biased, then the vote of the court martial would [34] become pertinent, or might become pertinent. Was it a unanimous vote?

Mr. Davis: I don't think it would.

Q. (By Mr. Karesh): Or was it a two-thirds vote? There must be a two-thirds vote?

A. Correct.

(Testimony of William C. Chase.)

Mr. Davis: I don't think it would.

The Court: Read the question.

(The question was read by the reporter.)

Mr. Karesh: The oath requires the general to keep it in confidence unless required to give answer thereof as a witness in a court of justice in due course of law. It requires a two-thirds vote of the court martial to secure a conviction. If there were an unanimous court then it would become material as to whether or not General Chase was prejudiced.

Mr. Davis: I object to it.

The Court: Overruled. He may answer if he wishes.

Mr. Karesh: Your Honor said, "if he wishes." There must be a direction to the witness; otherwise, under his oath he can't divulge the vote.

The Court: I have never met a problem quite like this; I am not going to compel the witness to answer, but if it will serve the ends of justice here which we are striving for he may answer.

Mr. Karesh: Your Honor, the general cannot answer that [35] question under this oath unless directed; so unless your Honor directs it we will withdraw the question; he can't. Well, I will ask him if he wishes to answer.

The Witness: I would not answer, sir, unless I am required by this court.

The Court: We will meet that situation. I will direct you to answer it now.

The Witness: Your Honor, the accused was found guilty unanimously by the court.

(Testimony of William C. Chase.)

Q. (By Mr. Karesh): General Chase, at the time of the trial of Colonel Murray, did you have any prejudice against him?

A. I had no prejudice against the man whatsoever.

Q. Any bias against him?

A. No bias. I had never seen him before he appeared in court.

Q. Did you have any bias against him at any time?

A. I have no bias against him at any time.

Q. Did you enter that court with the idea of securing a conviction against Colonel Murray, or did you enter the court with the idea that you would do justice as you saw it?

A. I went into the court with the firm resolution to give this man a fair trial and to do justice as the evidence was produced in the court martial.

Mr. Karesh: Your Honor, all the rest of the allegations about securing a conviction are met in the affidavit of General Chase in the inspector general's report. These are answered so [36] we don't think we need to pursue it any further.

Mr. Davis: If I understand you correctly, Mr. Karesh, the general is not at this time denying any of these allegations; he is merely resting upon what he said at some previous time?

Q. (By Mr. Karesh): General Chase, you heard read an affidavit into the record made by Major Johnston?

A. I did.

(Testimony of William C. Chase.)

Q. Major Johnston was one of the defense counsel? A. He was the defense counsel.

Q. Did he have any associates?

A. He had an associate, Lieutenant Colonel Tressler, I think.

Q. In this affidavit there is this statement made by General Johnston, I will read the statement:

“General Chase said, as nearly as I can remember the exact words, as follows: ‘Tansey, this is Chase, down in Yokohama. The prosecution has just rested. Is there anything that your office can do to gather more evidence to help us get a conviction.’ ”

Did you say “Is there anything your office can do to gather more evidence to help us get a conviction?”

A. I did not.

Q. There is also in this affidavit some conversation that you allegedly had with Captain Bachison—he was the trial judge advocate.

A. Correct.

Q. Captain Bachison, according to Major Johnston, said—and [37] this is the conversation that took place between yourself and Captain Bachison:

“General Chase addressed Captain Bachison and asked him, ‘Have you done everything you can do?’ Captain Bachison answered in the affirmative. General Chase then said, ‘This will never do.’ ”

Did that conversation take place?

A. The conversation took place, but I did not say, “This will never do.”

Mr. Karesh: That is all.

(Testimony of William C. Chase.)

Cross-Examination

By Mr. Davis:

Q. General Chase, you, as I understand it, had charge of the First Cavalry Division in Japan?

A. I was in command of it, yes.

Q. It is a fact, is it not, that prior to Colonel Murray taking over this position of custodian of the vaults in Japan, that the First Cavalry Division had charge of those vaults?

A. The First Cavalry Division guarded the vaults and still does.

Q. In addition to guarding them at the time Colonel Murray took over, and Colonel Shoemaker before him, it is a fact, is it not, that in addition to guarding them that your division, or the First Cavalry Division had charge of the actual control of those vaults as in the same position that Murray had later? [38]

A. My Second Cavalry Brigade in Tokyo along with all the troops in Japan at a given moment in October, 1945, seized the bank, seized various other banks, and we were in charge of everything in the vaults; my Second Brigade commanded by General Hoffman, until we turned it over to Colonel Murray; I think one week, maybe two weeks.

Q. For a certain time your division was responsible for the custody of everything that was in those vaults? . . . A. That is correct.

Q. Did that occur to you when you were asked or ordered to become the president of the court martial of Murray?

(Testimony of William C. Chase.)

A. No. It had nothing to do with that, whatsoever, and that fact was well known in Tokyo and well known to General Eichelberger and General MacArthur, and had nothing to do with my eligibility for appointment.

Q. You say General Eichelberger and General MacArthur made you the president of the court?

A. No; Eichelberger appointed the court.

Q. You say then that the fact that your own division, regiment, had, or somebody under your command had charge of these vaults prior to Colonel Murray, you still feel that that in no way prejudiced you from sitting as an impartial judge or president of this court?

A. It did not affect me one way or the other. I had never seen this man and knew nothing about him at all. [39]

Q. Without having seen him, did it ever occur to you that if at the court martial it had been proved that this man was innocent of having taken them it would have cast a reflection on the men under your command?

Mr. Karesh: I object to that as argumentative.

The Court: I will allow it.

The Witness: The question has never arisen. There has never been the slightest aspersion cast on any of our people in the First Cavalry Division with reference to our operations in the Bank of Japan.

Q. (By Mr. Davis): The question I asked you

(Testimony of William C. Chase.)

was, did it ever occur to you that if certain men under your command had charge of something and it was found that something was missing, and the man who was charged with having taken it was found innocent, wouldn't the implication be that it could have been or probably was someone who was under your command?

A. Not necessarily. The CIC was involved, the Criminal Investigation Corps was involved in moving these things, and all units in Japan were involved in transporting precious metals and jewels to the Bank of Japan, where my men for the first two or three weeks merely received them and stored them, and upon my urgent recommendation that there be an appraisal and inventory made to General Eichelberger, that was done, and this colonel, the first colonel, Shoemaker, I believe, came in who turned them over in a few days to Colonel Murray.

Q. It never occurred to you to disqualify yourself from sitting on the court martial?

A. No, it never did, and I would not consider that it is material at all, or that it was considered by General Eichelberger, the Army Commander—he very carefully considered the personnel of this court.

Mr. Davis: I ask that go out. He does not know what General Eichelberger considered.

The Court: The question and answer will stand.

Q. (By Mr. Davis): Coming now to the court martial, itself, it is a fact, is it not, that you did

(Testimony of William C. Chase.)

telephone General Tansey and ask him to secure more evidence?

A. It is a fact that I called up General Tansey, but all the rest of these things in here, it is all wrong, as far as that is concerned.

Q. Will you tell us what did you ask General Tansey?

A. I called up—I did not call General Tansey, as a matter of fact, I had the judge advocate call General Tansey in a room, in an open room which was an ante-room of the court, there was a table and telephone there, and where this young judge advocate, your Honor, had told me that he was having difficulty getting cooperation from the office in Tokyo known as the Civil Property Custodian's office, of which this General Tansey was commander. They have control over all these diamonds and all this merchandise that was in the Bank [41] of Japan. He told me that he was not receiving wholehearted co-operation from certain of the underlings in this office, so I decided to talk about this matter with General Tansey, and I called him, or had Bachison call him, and then I talked to him in this open room where there were several people, and where the defense counsel was, where the judge advocate was, and had a conversation with him, telling him that we were not getting as much co-operation from him as we would like to secure, and how about that, that he was to correct it. At that time I did say that we wanted

(Testimony of William C. Chase.)

more evidence in order to get a conviction. That is well borne out in this affidavit.

Q. Do you recall now what you did say to General Tansey?

A. That would be very difficult. It is two years ago. I know that I did not say this because of the fact that several witnesses who were in the room have testified under oath, and I do not remember saying it, myself.

Mr. Davis: I will ask that go out as to what several witnesses testified.

Q. In other words, that is the only way you remember it, is because somebody else says you did not say it; is that it?

A. I have only a general recollection. There was not anything—as a matter of fact, the conversation was a long conversation, a business conversation in which I told him that his colonel who was his executive was giving my Captain Bachison the brush-off and that I wanted it corrected, words to that [42] effect, and that is just about what happened.

Q. In other words, you deny now that you said anything to him about getting more evidence or that you wanted somebody to come up and identify the diamonds?

A. I deny that I told him we needed more evidence in order to get a conviction.

Q. Do you deny that specific language?

A. That is correct.

(Testimony of William C. Chase.)

Mr. Karesh: Would you have any objection if he looks at his affidavit, Mr. Davis?

Mr. Davis: We will look at it later. I am asking right now, Do you deny all of the language in that statement by Johnston that Chase called to get more evidence to get a conviction, or do you deny a portion of it?

A. Let me see the statement.

Q. I am referring now to the specific portion here, where he allegedly states—starting on page 1, line 30, and continuing over to half of line 1 on page 2 (handing document to witness).

A. I deny only the words “to gather more evidence to help us get a conviction.”

Q. Did you use the language “to gather more evidence”?

A. I may have and I may not have, and if—I may well have. As a matter of fact, it is my duty as president——

Q. Just a minute. I am not interested in your opinion of your [43] duties.

The Witness: Let me have the court martial manual.

The Court: Let him complete it.

The Witness: It is my duty as president of the court, under paragraph 75 in this Court Martial Manual, page 58, paragraph 75, as follows:

“The court is not obliged to content itself with the evidence adduced by the parties. When such evidence appears to be insufficient for a proper

(Testimony of William C. Chase.)

determination of any issue or matter before it, the court may and ordinary should take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view of discovering and producing additional evidence."

This telephone conversation of mine and General Tansey was in order to implement the duties of mine as president of the court.

Q. (By Mr. Karesh): What Article of War was that?

A. It is not an article. This is from paragraph 75 of Chapter 14 of a volume entitled, "A manual for Courts Martial, U. S. Army, 1928."

Q. That was in effect at the time? [44]

A. That was in effect at the time of the trial. The action I took in calling General Tansey was entirely in accordance with that, your Honor.

Q. (By Mr. Davis): In other words, it was your purpose in calling Tansey to attempt to secure more evidence; is that correct?

A. In compliance with that thing right there.

Q. Of course, you know, General——

A. The court felt that the judge advocate, the prosecuting attorney, had not brought in enough evidence, had not traced the ownership of these diamonds in question, and we felt that General Tan-

(Testimony of William C. Chase.)

sey's office would have some information which we should have in order to reach a fair trial both for the accused and for ourselves, and after the trial judge advocate, Bachison, had complained to me then I called this General Tansey, Civil Property Custodian, and told him that we were having this trouble and that we needed some help, and that was the sum and substance of the whole thing, and he sent down people who conferred with the judge advocate, some of them testified, and some of them did not; but the action which I took as president of the court is thoroughly justified and very customary in courts martials.

Q. That is an opinion of what that rule means in the manual, your opinion of what that means in the Courts Martial Manual?

A. My opinion of what? [45]

Q. That is your opinion of what that language means in the Manual for Courts Martial, when you say it is thoroughly justified and often done, that is your opinion?

A. That is the custom.

Q. You feel that to be——

A. I know it is from thirty years' experience.

Q. At the time you called this recess and called Tansey, you did not believe the trial judge advocate had put in sufficient evidence to prove the identity of the diamonds?

A. The court felt that not enough evidence had been introduced in the——

(Testimony of William C. Chase.)

Mr. Davis: I object to the general prefacing or starting his answer by saying "It was felt." He cannot speak for the court.

Mr. Karesh: Yes, he can.

Mr. Davis: Not what a man might feel.

The Court: Read the question.

(Question read.)

The Witness: I did not feel, myself, that there had been enough, and I felt it was my duty under the Manual of Courts Martial to direct this action of bringing in more witnesses, and bringing in more, let us say, direct tracing of the ownership of the diamonds in question.

Q. (By Mr. Davis): You did not instruct the trial judge advocate to put on those witnesses? [46]

A. Yes, I did, and he told me, this young man told me he had had trouble with these higher-ups and that was why I personally talked to General Tansey to break an administrative block which I did.

Q. In other words, in this matter it was apparent to you as president of the court that the prosecution for some reason or other could not get sufficient evidence, and they called that to your attention, so you spoke to their commanding officer to make it possible for them to do so?

A. That was my duty under the Manual of Courts Martial. I would have done the same thing for the defense had they made any complaint to me about it.

(Testimony of William C. Chase.)

Mr. Davis: I will ask all the answer go out. I did not ask him his duty, and I did not ask him if he would do it one way or another.

Mr. Karesh: I will ask the answer stand.

The Court: I will allow the record to stand.

Q. (By Mr. Davis): You know Colonel Esterbrook, don't you?

A. Yes. He was a member of the court.

Q. If I told you that Colonel Esterbrook made the statement and that it was a true statement of what you did at that time——

Mr. Karesh: If there is a statement show it.

Mr. Davis: I am asking the witness—Well, I can find it here.

Mr. Karesh: If you want to find it—— [47]

The Court: Just a moment.

Mr. Karesh: I object to the form of the question.

Mr. Davis: It is proper cross-examination, your Honor.

The Court: The form of the question is objectionable.

Mr. Davis: Well, if the Court please, I will ask time. We will have to have a recess anyway, I presume, for noon, and I will find the specific questions.

The Court: Very well. We will take a recess until two o'clock.

(Thereupon a recess was taken until two o'clock p.m., this date.) [48]

Afternoon Session, March 28, 1949

WILLIAM C. CHASE

recalled.

Cross-Examination

(Resumed)

By Mr. Davis:

Q. General, if I understood your testimony correctly, you did have a telephone conversation with General Tansey during a recess of the court?

A. That is correct.

Q. According to you, you had that conversation with him because you felt that there was insufficient evidence as to the identity of diamonds before the court?

A. We felt that that point had not been covered, and we felt also that the ownership of these diamonds should be covered, and we also felt that they should be traced into the Bank of Japan. We felt that way not only on the Government's behalf, but on the accused's behalf.

Q. And you also felt, did you not, that General Tansey was not giving cooperation to the trial judge advocate?

A. That is not correct. We felt that some of his subordinate staff were not cooperating with the judge advocate to the fullest extent.

Q. Was there any other officer there in Tokyo who was not connected in any way with the court martial, who was not a member of the board to whom the trial judge advocate could have gone to get this cooperation from General Tansey or his staff? [49]

A. He very properly came to the court, because——

(Testimony of William C. Chase.)

Q. I did not ask you that. I asked you was there any other officer, for example, General Tansey's commanding officer, who was that?

A. General MacArthur.

Q. No other general under General MacArthur?

A. That is correct. He was Civil Property Custodian of General MacArthur.

Q. It is a fact that the trial judge advocate, if he felt he was not getting cooperation from any branch of the Army in preparing the case for the prosecution, could have gone to some officer or to the staff of General MacArthur, or to General MacArthur, himself, to make that fact known?

A. He could have spoken to the Judge Advocate's Department in the Eighth Army Headquarters, which, as a matter of fact, I believe he did.

Q. You felt that under the Manual of Courts Martial you were permitted as president of the Court, when the prosecution told you that they were not getting cooperation from some people who could give evidence, you felt that under your interpretation of that Manual that you were entitled to try to see that they got the co-operation?

A. I felt the court wanted the whole picture spread before it. We wanted all the facts in the case spread before the court and we did not feel at that time that such had been done. [50] That was the effort that we made to get a full exposition of all the pros and cons in the case laid before the court.

(Testimony of William C. Chase.)

Q. But in your conversation with General Tansy, as I understand it, you did ask him if he could get more, or if he had any evidence concerning the identity of these diamonds?

A. No. I told him we felt that we were not receiving full co-operation from his subordinate staff officers and that we wanted——

Q. Isn't it a fact you also asked him the specific question about the identity of the diamonds and whether or not he could produce any such evidence?

A. I may have. I may have; I am not sure; I do not remember that.

Q. Do you have any independent recollection of that telephone conversation now?

A. Yes; indeed, I have.

Q. You have a clear recollection?

A. Yes; I have a clear recollection of the subject matter; verbatim, I do not.

Q. You have had that recollection of it since that time; I mean continuously since that time; is that correct? I mean if you have a recollection of it now you knew it three months ago, six months ago, a year ago?

A. I have refreshed my memory from my affidavits which I put before the inspector general.

Q. May I see Exhibit 1-B, please? Did you say in your testimony [51] here today that your trial judge advocate telephoned him?

A. I told Captain Bachison to get General Tansy on the phone, and when he had General Tansy on the phone I talked to him, myself.

(Testimony of William C. Chase.)

Q. I wish to direct your attention to page 407 of the proceedings before the Board of Review. I will ask you to examine this entire page.

A. You wish me to read this; is that it?

The Court: Read it to yourself. He is going to examine you on it.

A. Yes; I am familiar with this.

Q. (By Mr. Davis): Read the question on page 469:

“Please state what conversations you had with General Tansey on this subject.”

A. Yes.

Q. Do you remember being asked that question?

A. Yes; I was asked it. That was taken down under oath and affirmed.

Q. Do you remember giving this answer to that question:

“A. I had had no conversations that I remember up until that time. Frankly, I found that the trial judge advocate had been given the brush-off by some of the underlings in General Tansey’s office, primarily his executive, so I personally called up General Tansey and told him what the situation was, and from there on in [52] apparently we were able to do business with them.”

This is a statement given six months after the trial.

A. That was given some five or six months later, that is correct.

Q. Was your recollection any better at that

(Testimony of William C. Chase.)

time than it is now, of what transpired?

A. I would say it is about the same. I have also this which is the only record that I have, but which is not taken under oath.

Q. In view of this statement, "I personally called up General Tansey," do you say to this court today that it was Captain Bachison who called him?

A. It was my custom always to have my aide or somebody make the connection and then I talked to the party with whom I had to do business, which I did in this case. I had other things to do, and I asked Bachison to make the connection, which he did, which is quite customary. The conversation with General Tansey was mine with him over the phone, about this case, after the connection was made, and which was a courtesy and quite customary in the military to do.

Q. Do you remember this question:

"Did you have more than one telephone conversation with General Tansey?"

A. Yes.

Q. Do you remember making this answer:

"I wouldn't remember, that was six months ago, and I [53] hold lots of telephone calls, I might have called him once, twice, three times, I wouldn't care to state."

A. That is quite correct. I remember having this one telephone conversation with General Tansey, which, I believe, is the only telephone con-

(Testimony of William C. Chase.)

versation that I had with him. There may have been others, because I talked to many people in the course of administering that division there in the City of Tokyo. I may well have had other conversations with General Tansey. I do know I had this one with him, which is the conversation in question.

Q. Do you recall being asked the question:

“Do you recall speaking to General Tansey over the telephone the day before this long recess I referred to previously was taken?”

A. Yes; that is the conversation to which we referred.

Q. Do you remember this answer:

“No; I can’t remember specifically when I called him or what time, or anything about it; that is six months ago.”

A. That is correct. That was my answer, and it is right there.

Q. You say now, General, that you have an independent recollection of this conversation, yet in the statement given six months later under oath you said, “No, I can’t remember specifically when I called him or what time, or anything about it; that is six months ago.” [54]

A. Yes. I said I did not remember what time I called him, or when it was.

Q. You said, “I don’t remember anything about it.” Now, you have an independent recollection of it?

A. That is correct, and after that, if you will

(Testimony of William C. Chase.)

read the next you will find that.

Q. I will read the next.

A. Read the next one or two; you will find I am talking of this specific conversation and I say I do remember this conversation.

Q. By the way, have you talked over your testimony in this case today with anyone?

A. I have conferred with the United States Attorney here, and with Colonel Voorhies, who is from the office of the judge advocate general of the Army, and I read this testimony which you are speaking with me now.

Q. Do you recall this question—

A. I also talked, of course, with General Tindall, who took this testimony here which you have in front of you.

Q. And your answer when you said, "I cannot remember specifically when I called him or anything about it; that is six months ago."

Do you remember this question: "I now show you an affidavit of Major Ralph S. Johnston, the defense counsel, dealing with that telephone call. Do you have any comments?" [55]

A. Yes, I recall that.

Q. Do you recall this answer:

"Well, I had a telephone conversation with General Tansey. What is the date of this?"

A. Yes.

Q. "The affidavit was made 9 October, 1947." Do you recall that?

A. Yes.

(Testimony of William C. Chase.)

Q. And this answer:

“Well, I had a telephone conversation with General Tansey, but I certainly do not remember that it ran like that. I don’t remember anything of this sort, at all. In fact, this is entirely foreign to any recollection of mine of any conversation that I carried on. In fact, I would even go so far as to say that was drummed up.”

Do you remember that? A. Yes.

Q. Do you remember this:

“Do you feel you did not use an expression such as ‘Is there anything your office can do to gather more evidence to help us get a conviction’?”

A. Yes.

Q. “A. I absolutely deny making that statement, I made no such statement, whatsoever.”

A. I denied it then and I deny it here again. [56]

Q. What I want to know is, do you deny making that statement and using that language and those exact words, because you actually now and at the time you made this statement have a recollection of it, or merely because you feel that all the evidence would have suggested something else, it is not the thing which would have been done?

A. I am stating to you I did not make the statement, because I know I never would have made any such statement.

Q. You say you did not make it because you know that you would not make such a statement?

A. I did not make the statement.

(Testimony of William C. Chase.)

Q. You say in your statement here:

“Well, I had a telephone conversation with General Tansey, but I certainly do not remember that it ran like that. I don’t remember anything of this sort, at all. In fact, this is entirely foreign to any recollection of mine of any conversation that I carried on.”

You say in one breath you haven’t any recollection of it, that it was six months ago, and when you are asked a leading question as to whether you said certain words, you have a very clear recollection you did not say them.

Mr. Karesh: That is objected to——

The Witness: The action——

The Court: The witness wants to answer.

The Witness: The action, the allegations which were made [57] in that affidavit by Major Johnston were so astounding and amazing, that I was really astounded at the temerity and audacity of that which Major Johnson said, and which he was not able to back up.

Q. (By Mr. Davis): Well, do you think that under the Army regulations that a man participating as defense counsel, if he believes that a certain thing had been said, that he was audacious in calling that to the attention of the proper authorities?

A. When they are false, yes.

Q. You say they are false; is that correct?

A. That is my statement, yes, and he does not even back his own statements up under oath.

(Testimony of William C. Chase.)

Mr. Davis: May that go out, your Honor?

The Court: Yes.

Mr. Davis: I want to clarify one further point, and that is this: When I asked you if you recalled whether or not you used this language, in view of the fact you had just previously stated that you could not recollect the conversation, you said that you were sure you did not say that because you would not say it. In other words, do you have an independent recollection of any conversation right now? Do you know the language you used?

A. I have a very certain recollection that I did not use that statement. That can be borne out by people who were in the room. [58]

Mr. Davis: I will ask that that go out. I am only asking you not who, if anyone else, was in the same room. I am asking you right now, you say you stated in your affidavit there taken six months before the trial that you could not recollect the conversation, six months after the trial, rather, but you do recollect you did not say what Johnston said you said? A. That is correct.

Q. What I wanted to know is, do you have an independent recollection of the conversation so you can say you did not say it?

A. Yes. I have enough of a recollection of that conversation to say I did not make that statement.

Q. Is that based on the feeling you have or the feeling you would not have made such a statement?

A. It is based on that, and also based on sworn

(Testimony of William C. Chase.)

testimony of people who heard what I said there.

Q. In other words, you are relying upon the testimony of other people as to what you said?

A. I am relying upon my own memory and their testimony, both.

Q. So you do not remember anything about the conversation except you remember you did not use the definite language; is that it?

A. It was a general conversation with General Tansey.

Mr. Davis: That is all.

Redirect Examination

By Mr. Karesh:

Q. General, was Major Johnston present in the room [59] when you had the conversation, or made the telephone call to Tansey? A. He was.

Q. Did you attempt to keep him out of the room?

A. No. It was a public room. No effort was made to keep Major Johnston or anyone else out of the room at all; just as public as this room, right here.

Q. Did Major Johnston or any of the associate counsel challenge you to get off the court at that time, or at any time? A. No.

Q. When you made the inquiry of General Tansey, were you concerned with all of the jewels or only the jewels that were not smuggled into the United States, with particular reference to the second charge and specification?

A. Well, there was that one—we were interested

(Testimony of William C. Chase.)

in the whole case, of course. We wanted the whole picture spread before the court so we could make a fair adjudication of the matter.

Q. Did you ask for that evidence in order to get a conviction, or in order to get a complete picture of the case?

A. We asked for the evidence, as is our right there, in order to get a complete picture of the case before the court, as much for the prosecution as for the defense.

Q. What was the value of the jewels, as you remember, that you found Colonel Murray—you and the members of the court found him guilty of misappropriating? [60]

A. It is in the record, roughly \$200,000.

Q. That was the retail value?

A. That was retail value, yes.

Q. As far as the value of the jewels that were allegedly smuggled into the United States, do you remember the value of those jewels as fixed by the court?

A. The value fixed by the court in their findings was eighty or ninety thousand dollars, I believe, finally.

Q. That is all the jewels that Colonel Murray had——

A. All the jewels, yes.

Q. Any value fixed on the amount of jewels he allegedly turned over to the customs officers who searched him after he had gone down the gang-plank?

(Testimony of William C. Chase.)

A. I believe roughly \$20,000. I may be wrong on that. That is in the record.

Q. During the course of the trial, did Colonel Murray ever deny that he had misappropriated the jewels?

A. No, not that I recollect. He made an unsworn statement before the court.

Q. What was the unsworn statement?

A. That is in the record. The unsworn statement was to the effect these jewels didn't come from the Bank of Japan, as I remember.

Mr. Karesh: That is all. [61]

Recross-Examination

By Mr. Davis:

Q. You say that all of these actions that you took were due to your desire to get the complete picture before the court, that you were motivated in assisting the prosecution as opposed to assisting the defense, and that you just wanted to get the entire picture before the court, in fairness to the prosecution, and in fairness to Colonel Murray?

A. That is correct. That is my duty as president of the court, as I read you this morning.

Q. Isn't it a fact that you granted the continuance to the Government to produce this evidence about which you talked to General Tansey, and after that you denied a motion for the defendant to produce an expert diamond witness to assist in the cross-examination of the witness of the Government?

(Testimony of William C. Chase.)

A. That is correct, but he was later given a very long continuance to prepare his defense in plenty of time to have gotten all the diamond experts in the Far East if he so desired, and he brought none.

Q. But when the motion was made it was denied?
A. That is correct.

Mr. Davis: That is all.

Further Redirect Examination

By Mr. Karesh:

Q. Isn't it true, General Chase, that at your recommendation during the course of the trial you were responsible in getting Colonel Murray out of custody and bringing [62] him to live in a hotel?

Mr. Davis: That is objected to as incompetent, irrelevant, and immaterial.

Mr. Karesh: You say he is so prejudiced and we are asking a question whether the general was not responsible, during the course of the trial, of getting him out of custody.

Mr. Davis: I don't think that would have any material effect on his prejudice one way or the other.

The Court: Well, it would at least show he was feeling kindly toward him.

Mr. Davis: To that extent, yes.

The Court: What is the answer?

The Witness: The defense complained to me that they were having trouble in conferring with the accused, and at that time Colonel Murray was confined in the Eighth Army Stockade, which is some twenty miles or twenty-five miles from the

(Testimony of William C. Chase.)

court, from Yokohama. I interceded with the commanding general of the Eighth Army and recommended and was able to have Colonel Murray released from confinement, and during the remainder of the trial he lived in the Grand Hotel in Yokohama, where he was able to confer with his attorney, and had every bit as good a chance to see everybody and talk to everybody as anybody else. That was done at my instigation as president of the court on the defense request. They told me that they had been turned down once or twice and then I got it fixed up so that he was turned [63] loose and could do business.

Mr. Karesh: That is all.

Mr. Davis: No further questions.

Mr. Davis: If the Court please, I wish to make one further statement: That is this: When I put the petitioner on the stand I asked him certain questions concerning his war record. I brought out that he was a combat officer. At that time it was my opinion, I might say it still is, that I did not believe that anything concerning his war record or his decorations was relevant. My whole purpose in asking that matter was because one of the points I raised in my petition is that he was denied the right of counsel, and I wished to point out the matter of his background, his decorations and positions in the United States during civilian times and during the war, both World Wars, that it was not in an administrative capacity, and he was not the type of man who would have been put on his guard as a

defending counsel. It was limited to that sole purpose.

However, your Honor, in permitting Mr. Karesh to inquire into the general's war record, seemed to think it was relevant that the record and the decorations and the history of the president of the court martial is relevant. If that is true, then I feel, in fairness to the petitioner, that he should be permitted to take the stand to testify as to his war record and as to his decorations. [64]

Mr. Karesh: Is it your contention—you brought out this original reference, was it to show Colonel Murray was not familiar with court martial proceedings?

Mr. Davis: No. I brought it out for the limited purpose of exactly what I stated. I did not think, and I still don't think that it is material to a habeas corpus proceeding whether the petitioner or the president of the court has one decoration or ten, or whether he was in the quartermaster corps or whether he was a combat officer.

The Court: If he wants it in he may have it.

Mr. Karesh: I have no objection. We are not disputing his record.

EDWARD JACKSON MURRAY

recalled; previously sworn.

Direct Examination

By Mr. Davis:

Q. Will you tell the court briefly what your record in the Army has been, as to both the First

(Testimony of Edward Jackson Murray.)

and Second World Wars, as to whether or not you were in any combat zones or fought any engagements, or exactly what you did?

A. In the First World War I was in two combat zones. I personally did not engage in combat. I was in the zones, and was granted the right to wear the bronze star, denoting a combat zone.

In the Second World War I am entitled to wear, or was [65] entitled to wear, three stars for three combat zones, in which I actually participated in combat; the Bismarck Archipelago, Luzon, and South Philippines.

Q. What other decorations, if any, do you have?

A. Well, I was granted the Silver Star decoration, the Legion of Merit, the Bronze Star, Philippines, and the Combat Infantry badge.

Q. Is it true that you led one combat division into one of these islands that was taken?

A. The combat team.

Q. Tell the court briefly what that is, what that means.

A. A combat team is a reinforced infantry regiment. It usually has attached a battalion of field artillery and a company of engineers, and various other auxiliary arms. In mine I had in addition to those a company of tanks, a company of tank destroyers, an ambulance company, a 4.2 mortar company; in all, I had a force of about 4500 men.

Q. Where was that?

A. At Lingayen. My combat team was the second from the left. On the original assault landing

(Testimony of Edward Jackson Murray.)

at Lingayen Gulf my combat team led the whole operation first, until we ran into real organized resistance, and then we turned right, turned off the road and drove the Japs back into the hills. My combat team got 1700 Japs in five days. The rest of the division came up, a part of the 37th Division, one regiment of that [66] on our left. They were pretty badly cut up in one day's fight when they pulled up there. I had in my own regiment, I don't remember the casualty list for the whole combat team, but in my own regiment of 3000 men there were 740 odd casualties in the first five days.

Mr. Davis: That is all.

Cross-Examination

By Mr. Karesh:

Q. You risked losing all these decorations, being stripped of these decorations, for some diamonds?

Mr. Davis: I object to that.

The Witness: I did not.

Mr. Davis: As being argumentative.

The Witness: I did not.

The Court: Just a moment. That has no place here. Let it go out.

Q. (By Mr. Karesh): By the way, these diamonds were not yours that you were charged with misappropriating, were they?

A. Certainly they were mine.

Q. Where did you get them?

A. They were given me.

Q. By whom? A. By an individual.

(Testimony of Edward Jackson Murray.)

Q. Who was the individual?

A. I don't know.

Q. You mean you won't say? [67]

A. I don't know. I do not mean I won't say. If I knew I would say. I cannot tell you his name.

Q. Who gave you the diamonds that you had in your pocket when you walked down the gangplank when Mr. Smith accosted you?

A. The same individual I am talking about. He gave me all the diamonds I had.

Q. How did he happen to give them to you? Did you ask him for them? A. I did not.

Q. Can you explain the circumstances under which he gave you those diamonds?

A. Yes, I can explain it.

Q. Will you? A. Yes.

Q. Go ahead.

A. I was sitting in my room in the Dai Iti Hotel in Tokyo, I believe it was the Sunday night after Thanksgiving, 1945. It was after dinner, in the evening. I don't know exactly what time. I was sitting there reading, and there was a knock on the door. I shouted, "Come in." I thought perhaps it was some friend that was coming in to see me. I knew several people in the hotel. Instead of a friend, the door opened and an individual came into the room whom I had never seen before, whom I have only seen once since.

He came in and asked me if I were Colonel Murray. I said, [68] "Yes," and he said that he had a

(Testimony of Edward Jackson Murray.)

package to deliver to me. I said, "All right." He said, "I haven't got it with me now, but I will bring it tomorrow evening, say about this same time, if you will be in your room." I said that I thought I would be, and after a little more casual conversation this man left.

The next evening he showed up, as he said he would. He came into the room and walked across the room to a desk—I was sitting in an upholstered chair beside the desk, on which was a stand lamp. He walked over to that desk and he took an envelope out of his pocket. He was wearing an overcoat. I think he took it out of the inside pocket of his overcoat, and he dropped that on the desk and he said, "I have been directed to deliver this to you and I have accomplished my mission. Good night." And he walked out. I never saw him again.

I opened the package and in the package were these diamonds.

Q. How many diamonds?

A. I don't know. I didn't know then. I think there were approximately 500. I never did count them. Some diamonds were in the paper—there was no mark—it was not a package, it was a large envelope. There was no mark on the envelope, no mark in the envelope that I could see.

Some of the diamonds were wrapped up in tissue paper, the small ones, and one lot of very small diamonds, I think someone mentioned it and said there were something like 300, [69] a very small

(Testimony of Edward Jackson Murray.)

package that these little diamonds were in, and some of the larger ones were also wrapped up individually in tissue paper. Then there was some that were wrapped three, four or five together. Why, I don't know. Some of them were not wrapped at all.

I took those diamonds and I put them in a little card box, a cardboard box, in which I had some calling cards. They were put into the box and I put the calling cards back on top of them. That box was approximately two inches long, one inch wide, and I suppose, one inch deep, a very small box.

Then I put the diamonds in my trunk. That is how I received them. Now, what is your next question?

Q. Well, when you came down the gangplank you had filed a baggage declaration, had you not, in San Francisco, at the time Mr. Smith accosted you? A. That's right.

Q. And you had not in your baggage declaration listed the diamonds, had you?

A. I had what?

Q. Had you listed the diamonds in the baggage declaration made with the customs before you were accosted by Mr. Smith? A. No.

Q. Will you explain why you did not?

A. Because I only had the four diamonds with me then; the same diamonds I had brought in previously and taken back to Japan and [70] brought them back. I did not feel as though I should list

(Testimony of Edward Jackson Murray.)

those diamonds I had taken away from the United States back to Japan and brought them back again.

Q. Why did you take them back to Japan and bring them back to the United States?

A. Because I simply forgot they were in my pocket when I got on the boat to go back to Japan.

Q. Do you know the value of those diamonds?

A. I do now.

Q. How much?

A. Approximately \$8000, I think, somewhere around that. That was the valuation put on them at the time of my trial.

Q. Do you know the value of the 500 diamonds?

A. I think I heard eighty thousand odd dollars, the statement that is in there. That is the only way I know what they are.

Q. Can you describe the man that you saw in the hotel?

A. Well, after a fashion I can. He was an Oriental. He was rather slim, probably five feet seven inches. He wore a gray overcoat, I think gray, dark gray. He had on a dark suit. I don't know just what shade it was. As most of those Japanese were there, his shoes were rather shabby. He had one characteristic that I noticed particularly, and that is the fact that he did not have that characteristic Mongolian eyelid. There are some Japanese that do not have it; most of them have, but [71] some don't. That is about all. He was evidently a man of some education. He spoke faultless English. He treated me as an equal.

(Testimony of Edward Jackson Murray.)

Q. It was your opinion then that he gave you those diamonds? A. Yes, it is.

Q. Did you report the alleged gift of this man to your superiors?

A. I did not. Why should I?

Q. Tell me, what happened to the other four hundred ninety-six diamonds after you got them? What did you do with them, that is, distinguished from the four?

A. Are you sure you are not a little bit mixed up?

Q. No; I am not mixed up; you said you got 500 diamonds. You walked down the gangplank with four of them. *That* did you do with the rest?

A. I brought all the diamonds I had, we will say 500, I am not sure exactly 500, but say 500; I brought them all to the United States when I came home and I think the ship landed in San Francisco, or, rather, in Oakland Army Base, on the 24th of—No, the 4th of April, 1946. I brought all the diamonds home at that time.

Q. Where did you put them?

A. I gave them to my wife, all of the diamonds. Then I was on 45 days leave. We traveled around the State among our friends, and we took those along with us, and showed them to [72] various people. Every time we would go anywhere we would show them to our friends. I used to carry a couple of them, as I say, these four I had in my watch pocket of my trousers. I just carried them around.

(Testimony of Edward Jackson Murray.)

When I left, when I went back to Japan in the latter part of May I was to sail from Seattle, my orders called for me to sail from Seattle. I took the ferry down here at the Ferry Building, and I had those four stones in my watch pocket.

My wife drove me down to the Ferry Building, and I said good bye to her there. While I was on the train that night, going to bed, getting into my berth, somehow or other I put my finger in this pocket and I discovered I still had those. I had forgotten to give them back to her, so I just left them there. I took them back to Japan with me. That was in June of—the ship sailed on June 12, I think, and we arrived on the 24th in Yokohama, June, 1946. Those are the four stones I brought back with me in 1947.

Q. At the time this person, as you say, gave you the paper container of diamonds, what were your duties as an officer of the U. S. Army?

A. I was officer in charge of the Eighth Army Vaults of the Bank of Japan.

Q. Did you believe he was giving you these diamonds to put into the bank?

A. I certainly did not or I would have put them in the bank. [73] I have received diamonds and other valuables at various times and they have always gone in the bank when they were intended to go in the bank. I have always given receipts for them. This man brought this in and told me they were for me. He put it down there.

(Testimony of Edward Jackson Murray.)

Q. You had never seen the man before that time?

A. I had never seen this man before.

Q. You had no idea why he brought you the diamonds?

A. I have an idea, yes.

Q. What is your idea?

A. The day after Thanksgiving, I think Friday, or it may have been Saturday, I had occasion to go down to Yokohama—1945—to see my superior, who was the military government officer for the Eighth Army, Eighth Army Headquarters was in Tokyo. I had a jeep. I drove my jeep down there, transacted my business, and I was coming back to Tokyo in the afternoon. I don't remember just what time. Well, it was just getting dark. Now, the distance between the Customs House in Yokohama in which was housed the headquarters, Eighth Army, and Central Tokyo, just near the Dai Iti Hotel, across the road, is just about 25 miles. About two thirds of this distance is Tokyo, the rest of the way is Yokohama. The two cities come together. There is no open space between them except that our bombers had burned out probably half or more of all the buildings in this distance. There were various places along this road where [74] there were some buildings that had not been burned. Some are as large as a city block, some would be several blocks, some would be only one building. In looking across that expanse, you just see a maze of chimneys sticking up. That is about all there was, except for

(Testimony of Edward Jackson Murray.)

these little places where buildings had not been burned.

About probably eight miles from Central Tokyo there was a place where the railroad crosses over the so-called highway. It was in terrible condition then. The road makes a small "S" turn, not very pronounced, under the railroad, and from either side you can see the road through this "S" turn. I was coming north from Yokohama just about dusk. As I passed under this underpass I could see the lights of a car ahead. They were, I don't know just how far, probably half a mile. That is, the car was facing me. Behind me was another set of lights. I could see those behind me in my rear view mirror. They just had been turned on a little while, as had my own lights. Just as I cut under this underpass and saw this car approaching me, I got closer to it and I could see the lights of another car approaching me. It looked as though they were maybe a mile or less than a mile behind the lights of the first car. As I approached that first car, I saw it was stopped there. As I got real close to it I saw there was something going on in the road. As I got closer I could see some men struggling in the middle of the road, there. Their car was stopped [75] on the side of the road facing Yokohama.

As I got close enough and my lights began to show plainly this car I saw what I thought were two American soldiers struggling with somebody on the road. I stopped my jeep as I got opposite. My in-

(Testimony of Edward Jackson Murray.)

tent was to get out and see what I could do to help these soldiers. As I stopped my jeep and moved across the road the two soldiers, if they were soldiers, they jumped up and ran; they ran behind this car, ran off to what would be the easterly side of the road and disappeared in some shacks that were along the road.

I did not know what to make of that. This individual who was on the ground got up. I saw he was evidently the driver of this car that was standing there. I was quite amazed at what had happened, of course, and I looked at him, and he evidently saw that I was coming across there, or had scared these people off who were manhandling him. So he got up and hissed at me and bowed and "Sank you, Sank you, Sank you." That is all he could say.

About that time the back door of this car opened. It was a big car. A portly-looking individual stepped out. He began to thank me quite profusely, pretty good English. I said, "What is going on here?" He said, "Oh, that is slight mistake, everything is quite all right."

I could not make heads nor tails of it. So I said, "Well, are you all right? How about this chap, here?" [76]

By that time he had wiped himself off a bit and turned and got into the right side of the car behind the wheel and started the engine. This portly gentleman, he seemed to be elderly, I couldn't see

(Testimony of Edward Jackson Murray.)

him very well, he asked me my name, and I told him, and he asked where I lived, and I told him, and he thanked me profusely, got in his car, and that was the end of the incident as far as I was concerned.

I went back to my jeep, got in the jeep, and drove back to Tokyo.

Now, I think that—Well, you don't want my opinion. That is just my opinion.

Q. Well, go ahead. A. Oh, no.

Q. You think it was that man?

A. No, it was not that man, because he was a portly individual. This other chap was slim. What I was saying, I think these two fellows were hijacking these people in this car, and what they had in the car I haven't any idea, but I think this young man, the younger man who came to see me and gave me the diamonds, I think he was sent by this other individual, or who else was in the car. I could see two people in the back of the car. I don't know. I think the diamonds were sent to me as a reward. That is my opinion; that is my belief.

Q. When you brought in the 500 diamonds originally, you did not declare them with the customs?

A. No.

Q. Can you explain why you did not do that?

A. I felt that I did not have to. I brought them home to give as gifts. I knew there was—as a matter of fact, I knew nothing about customs. I don't travel internationally. I don't know anything about

(Testimony of Edward Jackson Murray.)

customs. I know, of course, that there is such a thing as customs, but I brought them in because I did not know they were—I was not used to diamonds, I had no experience with diamonds in my life up to that time. I had no idea what their worth was. They were pretty things. I brought them in and gave them to my wife.

Q. She sold some of them?

A. She sold some.

Q. When you brought back the four diamonds you knew they were valuable? A. Yes.

Q. Yet you did not think to declare them with the customs?

A. No. I did not think to declare them for customs, because I had already had them in the United States and took them from the United States with me and brought them back to the United States.

Q. And that was one of the things for which you were tried by the court-martial, allegedly smuggling in diamonds? A. Yes.

Q. That's right? [78] A. That's right.

Q. You are experienced with courts-martial?

A. Very limited.

Q. You were familiar with the set-up of courts-martial?

A. Yes, in a way. I was no expert at it.

Q. Did you ever sit on any court-martial?

A. Yes.

Q. General courts? A. Two.

Q. Weren't you also the appointing and review-

(Testimony of Edward Jackson Murray.)

ing authority of special courts? A. Yes.

Q. For how long?

A. A matter of five years—not that long; four years.

Q. You had counsel, of course, at the time of this trial, to defend you in this trial, Major Johnston? A. Yes.

Q. You had associate counsel?

A. But the counsel I asked for was refused me.

Q. Who was that?

A. Colonel Woolworth. He was the man I wanted. He was refused me. Major Johnston was appointed counsel. Whether it was done deliberately or not, I don't know, but Major Johnston, he was not a lawyer. The only experience he ever had as counsel was on some special court cases. I have no complaint about Major [79] Johnston. He did the best he could. But that was his background. That was a man who was appointed for me, and I had to squawk like the devil to get Colonel Tressler, who had some law experience.

Q. Colonel Tressler was a lawyer, wasn't he?

A. Yes.

Q. He was associate counsel?

A. That's right, but the man I wanted was refused. He was available to help.

Q. Didn't Colonel Woolworth assist with the preparation of the trial in your behalf?

A. Not that I know of. I was put in the Eighth Army stockade incommunicado. I landed there on

(Testimony of Edward Jackson Murray.)

the 18th of February and the written orders to the commanding officer of the Eighth Army stockade were that I was to be kept incommunicado. I saw no one except the investigators that the Eighth Army sent down there, Colonel Hood and his men sent; they were the only people I was allowed to see. I was forced to see them. I was allowed to see no friends, no counsel, no nothing, until the 11th day of March, after the charges had been preferred against me, Major Johnston came out there.

Q. When you talked to the customs officials in San Francisco they did not threaten you, did they, or use any force upon you?

A. None, whatever. [80]

Q. The statement you gave them was free and voluntary, wasn't it?

A. Yes, I guess—I suppose it was.

Q. Tell me, do you think that Major Johnston did not represent you adequately? Do you have a complaint about his representation?

A. I have no complaint about what he did to the limit of his ability, but I am no law expert, myself. I couldn't tell when Major Johnston was making a mistake. I don't believe I was adequately represented when they wouldn't let me take the man I asked for who was available.

Q. How about Colonel Tressler?

A. Colonel Tressler, I had never heard of him before, never seen him or never heard of him. He was brought in there—not after the trial started,

(Testimony of Edward Jackson Murray.)

before the trial started—I don't know how long it was, a week or so after Johnston had come out. I don't say Colonel Tressler didn't do the best he could. I was not represented by the people I wanted. I can't say that they did not have my confidence as far as it went, but I did not believe then what I have told you in court today.

Q. As a matter of fact, you know under the Articles of War you are not entitled to pick your particular counsel; you know that?

A. I certainly do not. I say that I am entitled to pick my counsel if he is available.

Q. Are you certain he was available?

A. I am certain he was available. I know it. He has told me that, [81] himself.

Q. Wasn't he around at the time you were tried?

A. He was not.

Q. Where was he?

A. He was in Tokyo. I was in Yokohama.

Mr. Karesh: That is all.

Redirect Examination

Mr. Davis: Just one or two further questions, your Honor, in the interest of clarification and for the benefit of the record. Mr. Karesh continuously refers to 500 diamonds. Actually, a large number of those diamonds were industry diamonds, very small, weren't they?

A. They were very small, yes; probably 1/10th of a karat.

Q. About how big?

A. Not much bigger than a pinhead.

(Testimony of Edward Jackson Murray.)

Q. They made up most of the number?

A. Yes.

Q. How many diamonds were there of what we would consider as diamonds of any size, such as appearing in a ring?

A. There may have been, I really don't know, 30, maybe.

Q. So you would say you would think there were about 30 diamonds comparable to what we might be familiar with in a ring, and the others were the small——

A. That is my guess.

Q. That was about the size of the head of a pin? [82]

A. Yes.

Q. Did you have any idea at the time you received those diamonds or when you first brought them into the United States, of their value?

A. I had absolutely none; absolutely none.

Q. The first time that you came in did any customs officials present you with any declaration of baggage?

A. They did not.

Q. You were not requested to make any declaration the first time you came in?

A. I was not.

Q. What happened the first time, were there any reasons given by customs officers to you about it?

A. Not that I know of.

Q. The first time you merely walked off the ship?

A. I walked off the ship.

Q. The second time you were presented with a declaration?

A. Correct.

Q. That was the usual customs declaration, as you recall it, it is an exhibit here, was it not, that

(Testimony of Edward Jackson Murray.)

asked you to swear and take an oath that the following property in possession of the person was acquired abroad; is that correct?

A. I don't remember the wording.

Q. In any event, you felt—As a matter of fact, your Honor, it is the law that even if he had brought the diamonds in on a previous occasion and the customs did not find them, if he [83] brought them out and took them back in again they are not to be declared under the customs law as a baggage declaration.

In any event, that is what you felt, because you had them in once and took them back with you, that you did not have to declare them a second time?

A. That is the way I felt.

Q. You say when you had these diamonds here with you you did not make any attempt to hide the diamonds or to not disclose to your friends and associates that you had them?

A. Absolutely not. We showed them to all our friends. I did not try to hide them.

Mr. Davis: Nothing further.

Recross-Examination

By Mr. Karesh:

Q. How much money did you get for the diamonds that you actually sold? A. \$13,000.

Q. What has happened to these diamonds, did the Army get them back?

A. The Army has them, as far as I know.

Q. You felt that Colonel Tressler could not do

(Testimony of Edward Jackson Murray.)

for you what Colonel Woolworth would?

A. I never heard of Colonel Tressler.

Q. You knew at that time Colonel Woolworth was a member of the International Tribunal?

A. Of course, I knew it. [84]

Mr. Karesh: Nothing further.

Mr. Davis: I have no further questions.

Mr. Karesh: Nothing further.

The Court: Is the case submitted on both sides?

Mr. Davis: Yes, your Honor, with the understanding that we had this morning as to the brief and the argument.

(It was then agreed that petitioner would have two weeks in which to file a brief, the respondent would then have two weeks in which to file a brief, and the petitioner would then have one week to reply, and the matter was set for May 2, 1949, for oral argument.)

Mr. Karesh: May the record show, your Honor, that these documents which Mr. Davis has filed were furnished him by our office, through the courtesy of the Judge Advocate General's Office in Washington; we have given him the original files which he filed; also copies of complete records, so that he could prepare his brief. [85]

Friday, April 22, 1949

Mr. Davis: I will stipulate that if General Chase was brought back here and examined, or if he made an affidavit, that he would state that he did not

make the statement on page 42 of the transcript of testimony.

The Court: And that if he did he was in error, he did not so intend.

Mr. Davis: I will stipulate that he would say, either in affidavit or on direct examination, that he did not make the statement appearing on page 42 of the transcript at line 10, "At that time I did say that we wanted more evidence in order to get a conviction." And if he did say it, he was mistaken, and he intended to say, "At that time I did not say that we wanted more evidence in order to get a conviction." [86]

The Court: That will be stipulated for all purposes?

Mr. Karesh: That is stipulated. [87]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designed by the parties, to wit:

Petition for Writ of Habeas Corpus.

Order to Show Cause.

Stipulation.

Return to Order to Show Cause and Exhibit
“A”.

Order for Issuance of Writ of Habeas Corpus.

Copy of Habeas Corpus.

Return to Writ of Habeas Corpus.

Order Permitting Filing of Amended or Supplemental Petition.

Amendment to Petition for Writ of Habeas Corpus.

Supplemental Return to Writ of Habeas Corpus.

Order Discharging Writ.

Stipulation Extending Time Within Which To File Proposed Findings.

Stipulation Extending Time Within Which To File Proposed Findings.

Findings of Fact and Conclusions of Law.

Notice of Appeal.

Statement Of Points Upon Which Appellant Intends To Rely Upon Appeal.

Designation of Contents of Record on Appeal.

Order Re: Exhibits on Appeal.

Reporter's Transcript—Vol. 1—March 28, 1949.
Vol. 2—April 22, 1949.

Plaintiff's Exhibits 1-A, 1-B and 2.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of October, A. D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12380. United States Court of Appeals for the Ninth Circuit. Edward Jackson Murray, Appellant, vs. Lieutenant General Albert C. Wedemeyer, United States Army, Commanding General, San Francisco Port of Embarcation, Fort Mason, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 14, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit
No. 12380

In the Matter of the Application of
EDWARD JACKSON MURRAY, for a Writ of
Habeas Corpus.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY AND
DESIGNATION OF PORTIONS OF THE
RECORD FOR THE CONSIDERATION
THEREOF

The Appellant adopts as his Statement of Points on Appeal the Statement of Points in the certified typewritten Transcript of Record.

The Appellant designates for printing the entire certified typewritten Transcript of Record.

Dated: September 29, 1949.

/s/ JAMES T. DAVIS,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 19, 1949.

[Title of Court of Appeals and Cause.]

ORDER THAT PORTIONS OF THE RECORD
NEED NOT BE PRINTED

Good Cause Appearing Therefor, It Is Hereby Ordered that Petitioner's Exhibits 1-A and 1-B need not be printed as part of the Record on Appeal, but may be considered in their original form and in such form shall be considered a part of the Record on Appeal; provided further that excerpts from said Exhibits may be printed as an appendix to Petitioner's opening brief.

Dated: This 20th day of October, 1949.

/s/ WILLIAM HEALY,
/s/ HOMER T. BONE,
/s/ WALTER L. POPE,

Judges U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed Oct. 24, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER SUBSTITUTING PARTY AS RESPONDENT-APPELLEE

It is hereby stipulated by and between counsel for the parties hereto that Albert C. Wedemeyer, Lieutenant-General, United States Army, Commanding General of the 6th Army, be substituted as Respondent-Appellee in the place and stead of James A. Lester, Major-General, U. S. Army, Commanding General of the San Francisco Port of Embarkation, Fort Mason, California.

Dated: This 28th day of October, 1949.

FRANK J. HENNESSY,
United States Attorney.

By /s/ JOSEPH KARESH,
Assistant U. S. Attorney.

/s/ JAMES T. DAVIS,
Attorney for Appellant.

It is so ordered this 31st day of October, 1949.

/s/ WILLIAM HEALY,
/s/ HOMER T. BONE,
/s/ WALTER L. POPE,
Judges U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed Nov. 2, 1949.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

KIYOSHI KAWAGUCHI,
Appellant,

VS.

DEAN ACHESON, as Secretary
of State of the United States,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

APR 1 1950

FILED P. O'DEN,
CLERK



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IN THE
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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF OF APPELLEE

JURISDICTION

The jurisdiction of the District Court is conferred by the provisions of Section 903, Title 8, U.S.C. (The Nationality Act of 1940, Section 503).

STATEMENT

This is an appeal from a judgment of dismissal (R. 18) entered on the 29th day of July, 1949.

Notice of appeal was filed September 23, 1949, (R. 20) but no bond for costs on appeal was filed.

The record on appeal was filed in the District Court October 20, 1949, (R. 36) and in this Court October 24, 1949, appellant having theretofore and on January 16, 1950, obtained an order of this Honorable Court to file typewritten record on appeal. That typewritten record was filed with the Clerk of this Court on October 24, 1949, and four copies forwarded to the United States Attorney at Seattle, Washington, February 17, 1950, and received February 20, 1950.

Appellant's typewritten brief was served upon the United States Attorney by air mail March 21, 1950, and was received at Seattle, Washington, March 22, 1950.

THE RULES REQUIRE:

That bond for costs on appeal (Rule 73c) be filed with the notice of appeal. No bond for costs was so filed.

MOTION TO DISMISS APPEAL

Appellee moves that the appeal herein be dismissed for failure of appellant to file a cost bond at the time of filing notice of appeal or at all.

ARGUMENT ON MOTION TO DISMISS APPEAL

It is provided by Rule 73(c) Federal Rules of Civil Procedure as follows:

“Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal. The bond shall be in the sum of Two Hundred and Fifty Dollars, unless the court fixes a different amount * * *”.

No such bond was filed with the notice of appeal.

This being a requirement of the appeal itself, and this court as well as other appellate courts having heretofore held that the timely filing of the notice of appeal is mandatory and jurisdictional, it would seem to follow that the requirement of security for costs on appeal is likewise mandatory and jurisdictional.

National Union of Marine Cooks & Stewards v. Matson Nav. Co., 171 F. (2), 179 (9 Cir.).

No bond having been filed within the time fixed by the rule, it is respectfully submitted that the appeal be dismissed.

Without waiving the foregoing motion to dismiss, but insisting thereon, we will proceed to the merits.

PRELIMINARY STATEMENT

The complaint in this cause, brought under the provisions of Section 503 of the Nationality Act of 1940 (T. 8, Sec. 903 U.S.C.A.), was filed August 14, 1948, (R. 2) and after issue joined was set for trial July 22, 1949, but continued to July 28, 1949, on the oral motion of counsel for appellant. (R. 33)

The complaint alleges that plaintiff is a citizen of the United States, born at Shelton, Washington, November 24, 1919. That he is a permanent resident of the County of King, State of Washington. That in 1938, while a minor, he went to Japan to further his education and that ten years later, to-wit, in February, 1948, he desired to return to the United States. That he applied for a passport at the United States Consulate at Yokohama, Japan, and on March 4, 1948, his application was rejected on the ground that he was no longer a citizen or national of the United States because of his naturalization as a Japanese citizen in 1943. *The complaint admits that in 1943 he became a Japanese citizen.* (R. 3)

As appears from the original exhibit transmitted

to this court by virtue of the order of the trial court (R. 32) dated October 14, 1949, appellant was born at Shelton, Washington, on November 24, 1919, of Japanese parents. He was registered at the American Consular office at Tokio, Japan, from April 14, 1939, until November 24, 1940. On December 1, 1940, he again applied for registration as an American citizen, which application was approved, but *limited in validity to July 12, 1941.*

He failed and *neglected to take any further action with the American Consular officers in Japan until after hostilities had ceased.*

On March 25, 1943, and while this country was at war with the Imperial Government of Japan, appellant was *naturalized as a Japanese citizen.*

On March 4, 1948, almost five years after renouncing his American citizenship for Japanese citizenship, appellant applied to the American Consular office at Yokohama, Japan, for a passport, which was refused because of the act of appellant in renouncing his American citizenship in 1943 and acquiring that of the Japanese Empire. It is therefore a little difficult to see how, after an absence of ten years, it could under any circumstances be successfully claimed by appellant that he would be entitled to the privileges granted by the provisions of Section 903, Title 8,

U.S.C., which authorizes a certificate of identity entitling one in a foreign country to admission to the United States for the purpose of prosecuting a suit to determine his nationality under the facts pleaded in his complaint.

It is fair to assume under the admitted facts that after Pearl Harbor appellant was employed in furtherance of and for the Japanese war effort against the United States.

STATEMENT OF THE CASE

The complaint in this case was filed in the District Court August 4, 1948, (R. 2). The answer was filed February 11, 1949 (R. 5). In due course and on May 3, 1949, order was entered for assignment May 31, 1949. The cause was transferred from Judge Bowen's calendar to the calendar of Judge Black on June 2, 1949, and placed on the call calendar for June 3, 1949, at 10:00 A. M. On June 3, 1949, the case was set for trial July 22, 1949, at 10:00 A. M. July 21, 1949, trial date was continued to July 28, 1949, on oral motion of plaintiff (appellant) (R. 33).

On the trial date designated the appellant was represented by one of his counsel, William Y. Mambu,

of Seattle, and the trial was commenced in this manner:

"THE COURT: The Court will now consider the cause of Kiyoshi Kawaguchi, the plaintiff, versus George C. Marshall, as Secretary of State, defendant, Cause No. 2068.

MR. MIMBU: Your honor, in both of these cases George C. Marshall was named originally as Secretary of State, and I would like to make an oral motion to substitute Dean Acheson for George C. Marshall, as Secretary of State.

THE COURT: Any reason such motion should not be granted?

MR. BELCHER: No. (R. 23)

THE COURT: The motion for substitution in Cause No. 2068 is granted. The motion for substitution of Mr. Acheson for Mr. Marshall is granted in Cause No. 2154."

Counsel for appellant then stated that counsel from Los Angeles had sent an affidavit which was filed that day (July 28, 1949) for a continuance. To this request the Court replied: (R. 25)

"THE COURT: Both this Cause 2068 and Cause 2154 were set for trial some time ago. The court was advised by Mr. Bell, the clerk, that he had communicated with Mr. Mambu, one of the attorneys for the plaintiff, and Mr. Mambu's only request was that both cases be set for the same date. The court did set both cases for the same date. And for what date was that, Mr. Bell?

MR. BELL: The trial date was originally set for July 22.

THE COURT: It was set for July 22. The court had not even a hint that neither case would not be tried until one week ago. At that time the Court, probably in error, struck Cause 2154 from the trial calendar and placed it on the assignment calendar for this morning. The court further, perhaps in error, continued Cause 2068 from July 22, the date for which it was set, until today, making clear, however, to counsel that as far as Cause 2068 was concerned, we expected it to be tried today. I said the court may have been in error in that the court probably on the state of the record should have insisted that these cases be tried on July 22, 1949, in accordance with the setting.

I may say that while it may be the law that that the plaintiff in Cause 2154 did lose his citizenship, the court recognizes more persuasion in the position of one who contends that voting in a foreign election was not realized by him to cancel his American citizenship than the contention of another plaintiff that his being naturalized as a Japanese citizen was not realized as terminating his American citizenship. There was a period in this country when a woman who married in the United States an individual residing in the United States, but not admitted to American citizenship, lost her American citizenship although she was born in the United States, lived all her life, and continued to live here after her marriage, too, although she did not realize she was losing her citizenship. In comparison with that situation, it may be that one who voted in a foreign election should have to be judged to have forfeited his American citizenship. But in any event, because I have a sympathy for one in the predicament of the plaintiff in

Cause No. 2154. I will endeavor to give plaintiff in that cause a date for trial not earlier than about October of this year. But in Cause 2068 it seems to me that the court is not justified in granting a further continuance." (R. 26-27)

Appellant, after the court's ruling and ordering the trial to proceed, offered no evidence, and the appellee, in support of the affirmative defenses set up in his answer offered in evidence a duly certified copy of the records of the State Department as Exhibit "A", which was admitted in evidence.

"THE COURT: Any objection to defendant's Exhibit 'A' for identification?

MR. MIMBU: No objection.

THE COURT: Exhibit 'A' admitted." (R. 29)

Then followed:

"MR. MIMBU: If your Honor please, in checking this over, I think the fact remains that the plaintiff has not been furnished with certificate of identity, which has been requested. Frankly, without the plaintiff present, we have no evidence to present to the court. The only alternative we have is to take a non-suit, if that can be permitted; and we request a non-suit be entered in this case.

MR. BELCHER: I think the motion is too late.

THE COURT: You move for a non-suit?

MR. MIMBU: Yes.

MR. BELCHER: I think the motion is too late.

THE COURT: I think the motion for non-suit should be and it is denied." (R. 30)

THE COURT: The plaintiff in this action is not entitled to relief. His action is dismissed. (R. 31)

SUMMARY ARGUMENT

The trial court did not abuse its discretion in the denial of the motion for continuance made at the hour and on the date the case was regularly set for trial.

Rule 40, Local Rules of Civil Procedure of the United States District Court for the Western District of Washington provides:

"Absence of Parties when case is called.

When an action is regularly called for trial or hearing, if either party fail to appear, the party appearing may, unless the court otherwise direct, proceed with the trial or hearing and take either a dismissal of the cause or such verdict or judgment as may be proper upon the evidence."

The Federal Rules of Civil Procedure provide for the taking of depositions in foreign countries (Rule 28b) and although counsel knew more than six months before the trial date that the Consul General in Japan would not issue the certificate of identity applied for, no effort was made to take appellant's deposition. The sole idea has been to get appellant into the United States.

An examination of the applicable statute which entitles one in a foreign country claiming American nationality to a certificate of identity specifically provides:

“ * * * and from any denial of an application for such certificate, the applicant shall be entitled to appeal to the Secretary of State, who, if he approves the denial shall state in writing the reasons for his decision.”

There is no showing whatever, that appellant has availed himself of this administrative remedy.

Neither did the District Court abuse its discretion in denying appellant's motion for a non-suit at the close of the case, because such motion was not timely made, and there was an entire lack of diligence, both in seeking a continuance and in moving for a voluntary dismissal.

On dismissal, the Rules of Civil Procedure by Rule 52(a) require findings of fact.

I.

IT WAS NOT AN ABUSE OF DISCRETION TO DENY APPELLANT'S REQUEST FOR A CONTINUANCE.

The record clearly shows that counsel for appellant knew when the action was commenced in 1948 the reason a passport was refused was appellant's previous renunciation of his American citizenship, because it is alleged in paragraph V of the complaint

(R. 2) that appellant was registered at birth by his parents with the Japanese Consulate. That in 1939 while still in Japan, appellant rescinded his Japanese nationality and *four years later*, in 1943 he resumed his Japanese citizenship.

The record further shows, by the affidavit of Mr. Wirin, filed the day of the trial, July 28, 1949, (R. 8) that for nearly a year before the trial date, counsel knew the reason for the refusal of the State Department to grant appellant a passport and, to use counsel's own language:

“ * * * both plaintiff and affiant as his counsel took steps seeking the return of plaintiff to the United States for the purpose of testifying in the above entitled case. * * * ”

It says nothing whatever about appealing to the Secretary of State.

The affidavit further goes on with hearsay and has attached what purport to be copies of certain letters written by counsel to the United States Consul and purported answers by the United States Consul to counsel in Los Angeles, California.

While the complaint was filed in August, 1948, (R. 2) it was not until January, 1949, a period of five months, that counsel even made inquiry as to the status of appellant's application to the Consulate for a certificate of identity to enable appellant to return to

the United States to testify. The affidavit of counsel shows further that he waited another six months (until July 5, 1949) (R. 9) before he made further inquiry of the Consulate.

This, we assert, shows an utter lack of diligence upon the part of counsel. Surely during all of this time application could have been made to the court to take the deposition of appellant in Japan either orally or on written interrogatories, yet no such application was made. No doubt appellant's testimony, if taken would be self-serving and to the effect that he did not intend to renounce his American citizenship when he actually did so and in the very nature of things would be required to do so in order to become a naturalized Japanese citizen, the acquisition of which appellant admits in his complaint. At least some corroborating evidence would be necessary, yet no claim is made that it was counsel's intent to have other witnesses resident in Japan present were appellant to come to the United States for the purpose of offering this self-serving testimony which undoubtedly would be rejected, on objection, as self serving.

No affidavit has been filed herein signed by appellant setting forth any activity on his part seeking to acquire the necessary certificate of identity to enable him to come to the United States to prosecute

his claim to American citizenship except in October, 1948. All we have is the hearsay affidavit of Mr. Wirin. (R. 8) Certainly this affidavit alone cannot be seriously taken as worthy of consideration by the trial court in passing upon the application for a continuance.

ARGUMENT

The provisions of Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) do not go to the extent of entitling a person in a foreign country *who admits in his pleading* (R. 3, par. V of complaint) *that he is an alien*, to a certificate of identity which would entitle him to come to the United States for the purpose of explaining his reason for renouncing his American citizenship. That is precisely what the complaint filed herein seeks to do and asks our American courts to forgive appellant and restore him to that which he renounced at a time when this country was in mortal combat with the Empire for which he forsook his American birthright.

Where a native-born citizen of the United States expatriates himself, he is no longer a citizen of this country, but an alien.

Reynolds v. Haskins (1925) 9 F. (2d), 473;

Savorgnan v. United States (Jan. 9, 1950), 338 U.S. 491.

II.

IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR NON-SUIT AFTER THE CASE WAS CLOSED.

Counsel for the appellant when the case was called for trial opened the case for appellant by moving to substitute Dean Acheson as defendant in place of George C. Marshall, former Secretary of State. Then presented orally a motion for continuance based upon the hearsay affidavit of A. L. Wirin of Los Angeles, California — one of counsel for appellant. (R. 23-25)

The Court denied the motion. (R. 27) Appellant's counsel apparently being content to rest on his motion for a continuance, offered no evidence.

Appellee offered only a copy of the record before, and certified by, the State Department, Ex. A., and rested. (R. 28) Whereupon, Mr. Mambu of counsel for appellant made what may be termed a motion for non-suit (R. 29), which upon objection as coming too late (R. 30) was by the court denied.

The denial of a motion for non-suit, under the circumstances herein set forth, is not an abuse of discretion.

Rule 41(b) provides for involuntary dismissal as follows:

“For failure of plaintiff to prosecute * * * a defendant may move for dismissal of an action * * *.”

Rule 52 — R.C.P. provides:

“In all actions tried upon the facts without a jury, * * * the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *”

The courts have construed those rules in the following cases:

Young v. United States, 111 F. (2d), 823, (9 Cir.);

Gary Theatre Co. v. Columbia Pictures Corp., 120 F. (2d), 891, 892, (7 Cir.);

Allred v. Sasser, 170 F. (2d), 233, (7 Cir.).

In the instant case appellant offered no evidence and after appellee had offered his evidence, the motion for a non-suit was made.

Rule 41(c) provides, inter alia:

“ * * * A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made * * * before the introduction of evidence at the trial or hearing.”

Hence, our claim that the motion came too late.

ARGUMENT IN ANSWER TO APPELLANT

The burden of appellant's argument on his first point is that irrespective of lack of diligence on his part, it was an abuse of discretion for the trial court to deny his application for a continuance based upon the hearsay affidavit of one of his counsel, which application was not made until the hour of the day on which the case had been definitely set for trial after one continuance had theretofore been granted.

The granting or denial of a motion for continuance rests in the sound discretion of the court.

Girard Trust Co. v. Amsterdam, et al, 128 F. (2d), 376.

It is admitted that the granting or refusing of a continuance rests in the sound discretion of the court, and to entitle a party to a review, the party aggrieved must show conclusively an abuse of that discretion. This, we assert, appellant has not done, and the cases cited by appellant to this point as applied to the situation in the instant case are wholly inapplicable.

There might be merit in the contention had diligence been shown.

The record in this case shows clearly an entire

lack of diligence upon the part of appellant and his counsel.

It is admitted by appellant in his complaint that after going to Japan he renounced his American citizenship and became a Japanese citizen, therefore he, at the time of the filing of his complaint, was an alien and the statute whose provisions are sought to be invoked does not apply to aliens. What appellant sought to do was to obtain a certificate of identity from the Consul General of the United States in Japan entitling him to come to the United States for the purpose of attempting to convince the court in this country that he had no intention, when he became a Japanese citizen by naturalization, to renounce his American citizenship, but the Consul General, in full possession of the facts, refused and neglected to issue such certificate, consequently, as long as this certificate of identity could not be obtained, the appellant could never be admitted to the United States and he must rely upon evidence other than his own and, since the application for continuance was based solely on the inability of appellant to be physically present in a United States Court, in the absence of any showing that other witnesses whose testimony may be of value in determining intent, wherein can it be said the court abused its discretion?

A peculiar thing about this case is the entire lack of any showing that appellant himself is making any of the contentions advanced with reference to his intent. He did not, nor did anybody in his behalf, verify the complaint. He did not make any affidavit concerning his attempt to secure the necessary certificate of identity after the complaint was filed in the District Court in August, 1948, although one of his counsel says in his affidavit that he sent appellant a certified copy thereof for presentation to the American Consul in Japan. On the other hand, there is contained in Exhibit "A" an affidavit by appellant dated October 11, 1948, in which appellant gave as his reason for his renunciation of his American citizenship and acquisition of Japanese citizenship the purpose of bringing himself within the eligibility requirements for certain employment in Japan. He admits that his decision to become a citizen of Japan was made after having been refused only one position and that he had made no effort to apply for any other positions.

Appellant was granted Japanese citizenship March 25, 1943, which was six months before his graduation from Waseda University. It would therefore appear that employment requirements were not

the direct and immediate cause for his application for Japanese citizenship.

The case of *Royster v. Tederle*, 128 F. (2d) 197, cited by appellant at page 10 of his brief is not in point here because that was an action against a man in military service at the time of the institution of the action and there was specific statutory authority for the granting of a continuance under Sec. 103 of the Soldier's and Sailor's Civil Relief Act — 50 U.S.C.A. App. Sec. 513.

Counsel argue in this case that appellant was in no wise "negligent in failing to attend the trial."

Can it be said he was diligent when he made no attempt to have his deposition taken? We say not. In any event it is not a question of negligence, it is a question of diligence.

It is further argued that he had a right to be present at the trial. This, we deny. He is an alien by his own admission and this statute has no application to aliens. When the American Consul in Japan refused him a passport, and thereafter refused or failed to issue a certificate of identity, he had the right to appeal to the Secretary of State, which he nowhere alleges he did.

Neither the cases of *Acheson v. Murakami*, 176

F. (2d), 953, nor *Perkins v. Elg*, 307 U.S., 325, are authority for appellant's contention.

In the Murakami case there was involved the imprisonment of a Japanese at Tule Lake Concentration Camp, while in the Elg case there was involved the question of expatriation of a minor by the act of the parent.

The case of *Doreau v. Marshall*, 170 F. (2d), 721, cited by appellant although brought under the declaratory judgment act, differs from the instant case in that there Mrs. Doreau became a citizen of France, one of our allies in World War II, while here appellant became a citizen of Japan, one of our foes and with which Empire we were at war when the expatriation took place.

The case of *Podeau v. Acheson*, 179 F. (2d), 307, from the Second Circuit, is likewise distinguishable. There, against Podeau's will he was inducted into the Roumanian Army and was required to take the oath of allegiance to the King of Roumania, while here, the appellant was under no such compulsion, but was naturalized in Japan for the purpose of securing employment in Japan. Podeau on the one hand, as the opinion so clearly shows, made every effort possible to retain his American citizenship, while the exact opposite is true of the appellant here. Between

the time of the expiration of his registry with the American Consul in Japan in July, 1941, and the date of cessation of hostilities, no attempt was made by appellant to register at the American Consulate. In fact it was not until March 4, 1948, that he took up the matter with the consulate, — a period of almost seven years.

On the second phase of appellant's argument, the denial of a voluntary non-suit, we respectfully submit that the argument made is equally without merit and the authorities cited and relied upon do not sustain appellant's contentions.

CONCLUSION

It is respectfully submitted that the appeal should be dismissed for failure to file a cost bond. The rule applicable to appeals in *forma pauperis* are not here applicable merely because this court permitted the filing of a typewritten record and briefs.

To obtain the benefit of the provisions of Section 1915, Title 28, U.S.C., proceedings *in forma pauperis*, one must be a citizen of the United States. *Johnson v. Nickoloff*, 52 F. (2d) 1074. The appellant admitting he became a naturalized citizen of Japan when that Empire was at war with the United States,

is still in Japan, certainly is not entitled to use our courts without posting a bond.

In the event this contention is overruled, we respectfully submit that on the merits the judgment be affirmed.

Respectfully submitted,

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No. 12385

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

EARL W. TAYLOR,

Appellant,

vs.

P. J. SQUIER, Warden, United States
Penitentiary, McNeil Island, Washington,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

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NOV 26 1945

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IN THE
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HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

STATEMENT OF PLEADINGS AND FACTS

Appellant on August 13, 1949 filed in the United States District Court for the Western District of Washington, Southern Division, his petition for a writ of habeas corpus, asserting that his sentence was void and his imprisonment illegal. (Tr. 1 - 22). The appellant therein challenged the legality of his deten-

tion upon the grounds that Title 26 U.S.C.A. 145(b) with regard to acts committed by appellant as described in the indictment, being in conflict with other subdivisions of said section, was repealed thereby. (Tr. 18).

Appellant with his petition filed an affidavit of bias and prejudice on the part of the District Judge against the appellant. (Tr. 23 - 27).

The District Court on August 18, 1949 issued its order denying appellant relief upon his affidavit of prejudice and directing appellee to show cause on August 24, 1949 in the matter of the detention of appellant. (Tr. 28 - 32).

To the order to show cause appellee on August 19, 1949 filed his Answer and Return (Supp. Tr. 1 - 3) and produced in court the body of appellant at the time of hearing on August 24, 1949. (Tr. 33).

Thereafter the District Court made and entered its findings of fact and conclusions of law (Tr. 33 - 38); and based thereon an order denying appellant's petition and dismissing the action was entered in this cause (Tr. 39 - 40). From that final order, the appellant has been permitted to appeal in forma pauperis. (Tr. 41 - 50) in this cause Dkt. No. 1270 below, and denied such permission in Docket No. 1269 below. (Tr. 51 - 69).

The facts material to a determination of appellant's right to discharge from present confinement as disclosed in the record, may be summarized as follows:

An indictment containing four counts for violation of 26 U.S.C.A. Sec. 145 (b) was returned in the United States District Court for the Northern District of California, Southern Division on February 16, 1949 against appellant for false reporting of income tax with intent to defeat and evade the tax due to the United States. The appellant plead guilty to Count 2 which involved a return for 1945, and the other counts were dismissed.

Appellant was sentenced on March 2, 1949, to a term of five years imprisonment and to pay costs of \$50.00 and was received at the United States Penitentiary, McNeil Island, Washington on April 27, 1949, where he is now confined pursuant to said judgment and commitment. (Tr. 34).

Appellant has reputedly sought relief by way of motion to vacate the judgment, filed with the trial court, as well as sought relief in other petitions and on other grounds presented to the District Court from which this appeal is taken. (Tr. 8 - 10).

The appellant at time of hearing having by way of oral traverse admitted all the factual allegations

of the return, the District Court found "that there is no issue of fact in this matter before the court, and petitioner does not contend there is". (Tr. 33 - 38).

QUESTION PRESENTED

Is it within the scope of review on habeas corpus to determine between whether the sentence of appellant can be sustained under Section 145(b) of the Internal Revenue Code or under Section 3616?

ARGUMENT AND AUTHORITIES

The statute, under which the indictment was returned, Title 26, U.S.C.A., 145(b) reads in pertinent part as follows:

" * * *, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Appellant, however, in his specifications of Errors (Appellant's Brief page 6) prefers the provisions found in Title 26 U.S.C.A., Section 3616(a) and (b) which in pertinent part reads as follows:

"Whenever any person —

(a) *False returns.* Delivers or discloses to the

collector or deputy any false or fraudulent list, return, account or statement, with intent to defeat or evade the valuation, enumeration or assessment intended to be made, or

(b) * * * * *

he shall be fined not exceeding \$1000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

While appellant's arguments advanced in his brief seem to have somewhat strayed from the points asserted in his petition, they are essentially to the point that 145(b) does not sustain the indictment.

It should be observed that appellant's principal basis for his contention is that the assessment of tax must be made before any attempt to evade or defeat such tax can properly be alleged, and that the indictment returned in 1946 charging fraud in a return for 1945, prior to assessment on May 2, 1947 would be ineffectual under the provisions of said section 145(b).

Appellant has not cited any decision or legal authority for his position, being content, perhaps, to rely upon his familiarity with the statutes involved through his previous practice as an accountant, and the study of such law in that connection, to which he testified at time of hearing in the District Court, as sufficient authority for all of his statements.

The court decisions do not appear to lend support to the proposition advanced by appellant that taxes may not be evaded by an act committed prior to their assessment.

See *United States v. Gold*, 53 F. Supp. 848; and *Auerbach v. United States*, 136 F. (2d) 882.

Unlike appellant, counsel for appellee feel no immediate urge or need for delving into the genealogy of internal revenue provisions and would, therefore, confine their observations to whether or not the relief sought by appellant is available in these proceedings.

In the case of *Berkoff v. Humphrey*, 159 F. (2d) 5, involving a similar question of statutes applicable to tax matters, the court after observing the course of criminal proceedings afforded the defendant, at page 7, had this to say:

"The hearing on habeas corpus is not in the nature of an appeal nor is it a substitute for the functions of the trial court. This is true as to controverted issues of fact and as to disputed issues of law 'whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court'. *Henry v. Henkel*, 235 U.S. 219, 229, 35 S. Ct. 54, 57, 59 L.Ed. 203. 'It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Other-

wise every judgment of conviction would be subject to collateral attack and review on habeas corpus on the ground that no offense was charged or proved'. *Knewel v. Egan*, 268 U.S. 442, 446, 45 S.Ct. 522, 524, 69 L.Ed. 1036."

* * * *

"The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of habeas corpus when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power."

* * * *

"But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

And upon the bases of the question of which statute would be applicable in that instance, the court in *Berkoff v. Humphrey*, concluded:

"No exceptional circumstances called for the issuance of the Writ. If the sentence of which appellant complains is illegal, it should be vacated by the court which entered it and not nullified on collateral attack by a court of coordinate jurisdiction. See *Terrell v. Biddle*, 8 Cir. 139 F. (2d) 32, 33."

The procedure outlined as above in the Berkoff case, was initiated by the appellant, but he has been unwilling to await the orderly processes of the law, and instead has set in motion at least three appeals

to this court to determine the legality of his conviction.

Notwithstanding the number of appeals now prosecuted by the appellant, in the instant appeal the appellant has in his designation and brief interposed an assortment of claims that do not involve his right to relief in these proceedings.

Appellant's brief also seeks to involve the questions of illegal search and seizure, self-immunity, and being compelled to be a witness against himself in the matter of preliminary investigations. These are raised for the first time in the appellate court. It is appellee's contention that appellant's conviction rests upon a voluntary plea of guilty and not upon evidence obtained through search and seizure, and for the further reason these matters are not at issue in these proceedings.

See *Harlan v. McGourin*, 218 U.S. 442;
Cash v. Huff, 142 F. (2d) 60;
Miller v. Hiatt, 141 F. (2d) 690;
Burrall v. Johnson, 134 F. (2d) 614; and
Graham v. Squier, 132 F. (2d) 681.

CONCLUSION

For the foregoing reasons, it must be contended the decision below should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

GUY A. B. DOVELL,
Assistant United States Attorney
Attorneys for Appellee.



No. 12386

United States
Court of Appeals
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TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
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FILED

FEB 2 1950

PAUL P. O'BRIEN,
CLERK



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Hyde, Clarence

—direct	202
—cross	221
—redirect	232

Rugh, Loyall R.

—direct	235
—cross	243
—redirect	247

APPEARANCES

CARL E. DAVIDSON ESQ.,

1525 Yeon Building,
Portland, Oregon,

appearing on behalf of the Petitioner.

RALPH R. BAILEY, ESQ.,

723 Pittock Block,
Portland Oregon,

appearing on behalf of the Petitioner.

JOHN H. PIGG, ESQ.,

appearing on behalf of the Commissioner of
Internal Revenue, Respondent.

Docket No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1947

Dec. 24—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 29—Copy of petition served on General Counsel.

1948

Feb. 3—Answer filed by General Counsel.

Feb. 3—Request for hearing in Portland, Oregon filed by General Counsel.

Feb. 6—Notice issued placing proceeding on Portland, Oregon calendar. Service of answer and request made.

Apr. 6—Hearing set 6/1/48 in Portland, Oregon.

June 7—Hearing had before Judge Johnson on
& 8—merits and motion of S. R. Collins to withdraw as counsel—motion granted. Appearance of Carl E. Davidson and Ralph R. Bailey as counsel filed at hearing. Petitioner's brief due 7/23/48. Respondent's brief 9/3/48. Petitioner's reply brief 9/23/48.

June 7—Order allowing withdrawal of counsel of record for petitioner, entered.

July 23—Transcript of hearing 6/7/48 filed.

July 23—Transcript of hearing 6/8/48 filed.

July 28—Agreed motion for extension to 9/1/48 to file brief, filed by taxpayer. 7/28/48 Granted.

Aug. 24—Brief filed by taxpayer. Copy served 8/25/48.

Oct. 8—Motion for extension to Nov. 19, 1948 to file respondent's brief and to Dec. 20, 1948 to file petitioner's reply brief filed by General Counsel. 10/18/48. Granted

Nov. 18—Motion for extension to Nov. 29, 1948 to file brief filed by General Counsel. 11/19/48 Granted.

Dec. 3—Motion for leave to file the attached reply brief, brief lodged filed by General Counsel. 12/6/48 Granted and Served.

Dec. 31—Motion for extension to 2/15/49 to file reply brief filed by taxpayer. Motion granted.

1949

Feb. 11—Reply brief filed by taxpayer. Copy served.

Mar. 23—Memorandum findings of fact and opinion rendered. Judge Johnson. Decision will be entered under Rule 50. Copy served.

Apr. 19—Motion for reconsideration and for review by entire court, filed by taxpayer.

Apr. 19—Memorandum in support of above motion filed by taxpayer.

Apr. 25—Petitioner's motion for reconsideration is denied.

Apr. 26—Order denying motion for full court review, entered.

May 12—Respondent's computation filed.

May 16—Petitioner's computation filed.

May 18—Hearing set June 15, 1949 on settlement.

June 15—Hearing had before Judge Kern on settlement—continued to 6/29/49.

June 15—Order of continuance to 6/29/49 on settlement, entered.

June 29—Hearing had before Judge Johnson on settlement—Held C. A. V. Appearance of John F. Condon, Jr., as counsel filed, and affidavit of Carl E. Davidson.

July 12—Transcript of hearing 6/29/49 filed.

July 18—Decision entered, Judge Johnson, Div. 10.

Aug. 29—Motion to fix bond in the amount of \$13,791.88.

Aug. 30—Order fixing bond in the amount of \$14,000.00 entered.

Sept. 16—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by taxpayer.

Sept. 16—Statement of points and affidavit of service by mail thereon filed by taxpayer.

Sept.16—Designation of record with affidavit of service by mail thereon filed by taxpayer.

Sept.21—Notice of filing petition for review with proof of service thereon filed.

THE TAX COURT OF THE UNITED STATES

Docket No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:90D:DLA), dated October 3, 1947, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation with its principal office at 669 High Street, Eugene, Oregon. The returns for the periods here involved were filed with the Collector for the District of Oregon.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on October 3, 1947.

3. The taxes in controversy are income taxes, declared value excess-profits taxes and excess profits taxes for the calendar years 1942, 1943, and 1944, in the aggregate amount of \$55,638.42, and penal-

ties in the amount of \$8,968.49, or a total of \$64,606.91, the entire amount of which is in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in indicating that conferences were held on March 28, April 9, and May 28, 1947, with respect to the returns of the petitioner, and that any statements were made with respect thereto.

(b) The Commissioner erred in asserting delinquency penalties for the years 1943 and 1944.

(c) The Commissioner erred in indicating that the capital stock of petitioner was owned in equal proportions by John J. Rogers and Louis C. Scharpf, and in disregarding for Federal income tax purposes a partnership known as Twin Oaks Builders Supply Co., and transactions between said partnership and petitioner.

(d) The Commissioner erred in including in the taxable income of the petitioner income of said partnership for the years 1942, 1943, and 1944.

(e) The Commissioner erred in disallowing a net operating loss carry-over from the year 1941.

(f) The Commissioner erred in computing excess profits taxes on the net income of petitioner for the years 1943 and 1944, and in asserting deficiencies in income taxes, declared value excess-profits taxes, and excess profits taxes for the years 1942, 1943, and 1944, in the amounts set out in Exhibit A, or in any other amounts.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) On January 2, 1941, the stockholders of petitioner met at a special meeting duly and legally called, all of the stockholders being present, as follows:

John J. Rogers	472 shares
Eva M. Scharpf	436.7 shares
Louis C. Scharpf	35.3 shares
E. R. Bryson	2 shares
Total	<u>946.0 shares</u>

At this meeting the stockholders voted to discontinue and dispose of the wholesale and retail lumber and building supply business of petitioner and to reduce its activities to those of a holding company, which they were authorized to do under petitioner's Articles of Incorporation, retaining certain real estate, fixtures and equipment which might thereafter be leased; and to change the corporate name of petitioner to Twin Oaks Company, and appropriate resolutions were adopted authorizing the directors to proceed forthwith to carry out the purposes of such resolutions.

(b) At a meeting of the Board of Directors of petitioner on January 2, 1941, following the meeting of the stockholders, the resolutions of the stockholders were acknowledged and made a part of the proceedings of the directors, and in addition an offer made by John J. Rogers, Corabelle M. Rogers, Louis C. Scharpf and Eva M. Scharpf to acquire the operating assets, and assume the liabilities of

petitioner was accepted, and by an appropriate resolution the officers of petitioner were authorized and directed to execute on behalf of petitioner a lease covering the lands, buildings, and fixtures and equipment unto the purchasers for a period of one year.

(c) Petitioner thereupon discontinued the business in which it had theretofore engaged. The purchase price of the operating assets was in due course paid and petitioner has no interest in the business or profits of the partnership known as Twin Oaks Builders Supply Co. which the Commissioner seeks to attribute to the petitioner.

(d) Under date of October 3, 1947, the Commissioner addressed notices of deficiency to John J. Rogers and Louis C. Scharpf wherein, among other things, it is stated that "It has been further determined, therefore, that the incomes of the business conducted under the name of Twin Oaks Builders Supply Co., an alleged partnership, for the years 1942, 1943, and 1944 which were reported in the returns of (wife of taxpayer addressed) are taxable to you."

(e) The Commissioner has thereby determined that Twin Oaks Builders Supply Co. was a bona fide partnership as between John J. Rogers and Louis C. Scharpf, but has disallowed the participation therein of their respective spouses, and has issued notices of deficiency based upon such disallowances of the interest of the respective wives. Under these circumstances it is believed that this same income of Twin Oaks Builders Supply Co.,

by the Commissioner's own admission, cannot be added to the income of this petitioner, as Commissioner has done as will be seen from Exhibit A hereof.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that there are no deficiencies in Federal income taxes, declared value excess-profits taxes, or excess profits taxes for the years 1942, 1943, and 1944.

/s/ SPENCER R. COLLINS,

Counsel for the Petitioner

AFFIDAVIT

State of Oregon,
County of Lane—ss.

John J. Rogers, being duly sworn, says that he is president of Twin Oaks Company, an Oregon corporation, the petitioner above-named, duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true except those stated to be upon information and belief, and that those he believes to be true.

/s/ JOHN J. ROGERS,

Subscribed and sworn to before me this 18th day of December, 1947.

[Seal] /s/ KATHERINE P. MARTIN,
Notary Public for Oregon

My Commission Expires: 4/8/49.

EXHIBIT A

Treasury Department
Internal Revenue Service
Seattle 1, Washington

October 3, 1947

Office of Internal Revenue Agent in Charge,
Seattle Division, 305 A 1331 Third Avenue
Building.

IT:90D:DLA

Twin Oaks Company
669 High Street
Eugene, Oregon

Gentlemen:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1942, December 31, 1943, and December 31, 1944, discloses a deficiency of \$9,047.67 and that the determination of your declared value excess-profits tax liability for the above-mentioned years discloses a deficiency of \$10,716.79, and that the determination of your excess profits tax liability for the years ended December 31, 1943, and December 31, 1944, discloses a deficiency of \$35,873.96 and \$8,968.49 in penalty, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Colum-

bia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Seattle 1, Washington for the attention of IT:90D:DLA. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEORGE J. SCHOENEMAN,
Commissioner.

By /s/ S. R. STOCKTON,
Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form 870

DLA:mtr

Twin Oaks Company vs.

Statement

IT :90D :DLA

Twin Oaks Company
669 High Street
Eugene, Oregon

Tax Liability for the Taxable Years Ended
December 31, 1942, 1943 and 1944

	Liability Income Tax	Assessed Tax	Deficiency	Penalty
1942	\$ 1,394.61	None	\$ 1,394.61	
1943	3,305.23	\$184.85	3,120.38	
1944	4,672.53	139.85	4,532.68	
Total	\$ 9,372.37	\$324.70	\$ 9,047.67	

Declared Value Excess-Profits Tax

1942	\$ 373.11	None	\$ 373.11
1943	3,778.43	None	3,778.43
1944	6,565.25	None	6,565.25
Total	\$10,716.79	None	\$10,716.79

Excess Profits Tax

1943	\$11,311.08	None	\$11,311.08	\$2,827.77
1944	24,562.88	None	24,562.88	6,140.72
Total	\$35,873.96	None	\$35,873.96	\$8,968.49

In making this determination of your income, declared value excess-profits, and excess profits tax liabilities, careful consideration has been given to the statements made at the conferences held on March 28, April 9, and May 28, 1947.

It has been determined that by reason of your failure to file timely excess profits tax returns for the years 1943 and 1944, delinquency penalties are due in the amounts shown by the following tabulation:

1943.....	\$2,827.77
1944.....	6,140.72

A copy of this letter and statement has been mailed to your representative, Spencer R. Collins, Eugene, Oregon, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1942

Adjustments to Net Income

Net income as disclosed by return.....	\$ (248.55)
Unallowable deductions and additional income:	
(a) Other income	\$4,703.66
(b) Capital gain	591.63
(c) Net operating loss deduction	904.83 6,200.12
Net income adjusted	\$5,951.57

Explanation of Adjustments

(a) and (b)

You were organized under the laws of Oregon on or about August 8, 1924, for the purpose, inter alia, of selling lumber and building materials at retail. Your corporation income and declared value excess profits tax returns for the calendar year 1940 shows that your stock, which consisted of 946 shares was owned in equal proportions by John J. Rogers and Louis C. Scharpf. Subsequent to December 31, 1940, and prior to January 25, 1941, your corporate name was changed from Twin Oaks Builders Supply Company to the Twin Oaks Company.

On January 25, 1941, but "as of January 1, 1941," John J. Rogers and his wife, Corabelle M. Rogers, and Louis C. Scharpf and his wife, Eva M. Scharpf, executed a certain written document whereby they purported to associate themselves together as copartners under the name of Twin Oaks Builders Supply Co. for the purpose of selling lumber, building materials, and related lines at retail.

In accordance with the terms of the document executed January 25, 1941, you transferred certain assets theretofore used in the conduct of the business for which you were organized, consisting of cash, trucks, notes and accounts receivable, inventories, and a certain investment, to the Twin Oaks Builders Supply Co., the alleged partnership organized as of January 1, 1941.

On January 2, 1941, your corporation and each of the above-named four individuals executed a certain written document, by the provisions of which you purported to lease to the Twin Oaks Builders Supply Co., the alleged partnership purportedly organized as of January 1, 1941, your real estate, buildings, and furniture and fixtures previously used in the conduct of your business.

It has been determined that the transactions by which (1) a partnership purported to be organized, or formed, under the name of the "Twin Oaks Builders Supply Co.," (2) your corporation purported to transfer certain of its properties to the alleged partnership, and (3) your corporation purported to lease its real estate, buildings, and furniture and fixtures to the alleged partnership, are without substance and are to be disregarded for Federal income tax purposes. Accordingly,

the net incomes derived from the operation of the business conducted under the name of the Twin Oaks Builders Supply Co. for each of the years 1942, 1943 and 1944 has been included in your taxable income for each of said years.

In computing your taxable incomes for the years 1942, 1943 and 1944 deductions for compensation of your officers, John J. Rogers and Louis C. Scharpf, president and secretary-treasurer, respectively, have been allowed in the amount of \$6,600.00 each, a total of \$13,200.00 for each year.

	Ordinary Income	Long-Term Capital Gain
1942		
Reported on Forms 1065 filed by the Twin Oaks Builders Supply Co.	\$17,903.66	\$621.63
Less: Officers' salaries.....	13,200.00	
Long-term capital loss shown on your return..		30.00
Net additional income.....	\$ 4,703.66	\$591.63
1943		
Reported on Forms 1065.....	\$42,086.52	
Less: Officers' salaries.....	13,200.00	
Net additional income.....	\$28,886.52	
1944		
Reported on Forms 1065.....	\$66,002.66	\$116.67
Less: Officers' salaries.....	\$13,200.00	
Contributions	500.31	13,700.31
Net additional income.....	\$52,302.35	\$116.67

(c) It is held that you did not sustain a net operating loss during the year 1941. Therefore, you are not entitled to a net operating loss carryover, and the net operating loss deductions claimed on your 1942 and 1943 returns, in the amounts of \$904.83 and \$248.55, respectively, are disallowed.

Computation of Tax

Declared Value Excess-Profits Tax Computation

1. Net income for declared value excess-profits tax computation adjusted	\$5,951.57
2. Less: 10% of \$25,000.00 value of your capital stock as declared for the year ended 6-30-42.....	2,500.00
3. Net income subject to declared value excess-profits tax.....	\$3,451.57

Portion	Amount	Rate	Tax
5% of declared value of capital stock (but not more than L. 3).....	\$1,250.00	6.6%	\$ 82.50
4. Balance	\$2,201.57	13.2%	290.61
5. Total declared value excess-profits tax.....			373.11
6. Declared value excess-profits tax previously assessed, Account No. NC-41023.....			None
7. Deficiency			\$ 373.11

Income Tax Computation—Normal Tax Net Income Computation			
Net income for declared value excess-profits tax computation adjusted			\$5,951.57
Less: Declared value excess-profits tax.....			373.11
Normal-tax and surtax net income.....			\$5,578.46

Alternative Method

Normal tax and surtax net income.....			\$5,578.46
Less: Excess of net long-term capital gain over net short-term capital loss.....			591.63
Ordinary net income subject to income tax.....			\$4,986.83
Normal tax at 15% on \$4,986.83.....			\$ 748.02
Surtax at 10% on \$4,986.83.....			\$ 498.68
25% of net long-term capital gain.....			\$ 147.91
Total income tax liability.....			\$1,394.61
Income tax assessed, Account No. NC-41023.....			None
Deficiency in income tax.....			\$1,394.61

Taxable Year Ended December 31, 1943

Adjustments to Net Income

Net income as disclosed by return.....			\$ 739.43
Unallowable deductions and additional income:			
(a) Other income	\$28,886.52		
(b) Net operating loss deduction.....	248.55		29,135.07
Net income adjusted.....			\$29,874.50

Explanation of Adjustments

- (a) See Item (a), 1942, above.
 (b) See Item (c), 1942, above.

Computation of Tax—Internal Revenue Code—Corporation

Declared Value Excess-Profits Tax Computation

1. Net income for declared value excess-profits tax computation adjusted.....				\$29,874.50
2. Less: 10% of \$10,000 value of capital stock as declared for the year ended 6-30-43.....				1,000.00
3. Net income subject to declared value excess-profits tax.....				\$28,874.50
Portion	Amount	Rate	Tax	
5% of declared value of declared value of capital stock (but not more than L. 3).....	\$ 500.00	6.6%	\$	33.00
4. Balance	28,374.50	13.2%		3,745.43
5. Total declared value excess profits tax.....			\$	3,778.43
6. Declared value excess-profits tax previously assessed, Account No. 420506.....				None
7. Deficiency of declared value excess-profits tax.....			\$	3,778.43

Income Tax Computation

Normal Tax Net Income Computation

Net income for declared value excess-profits tax computation adjusted	\$29,874.50
Less: Declared value excess-profits tax.....	3,778.43
Net income	\$26,096.07
Less: Income subject to excess profits tax.....	13,484.11
Normal-tax and surtax net income.....	\$12,611.96

Normal Tax Computation

Domestic Corporations With Normal-Tax Net Incomes
Not Over \$50,000

Normal-tax net income.....				\$12,611.96
Portion of normal-tax net income (not in excess of \$5,000) ; and tax.....	\$ 5,000.00	15%	\$	750.00
Portion of normal-tax net income (in excess of \$5,000 and not in excess of \$20,000) ; and tax.....	7,611.96	17%		1,294.03
Total normal tax.....			\$	2,044.03

Corporations With Surtax Net Incomes Not Over \$50,000

	Portion	Rate	Amount of Tax
Portion of surtax net income (not in excess of \$25,000) ; and tax.....	\$12,611.96	10%	\$ 1,261.20
Total normal tax and surtax.....			\$ 3,305.23
Income tax assessed:			
Account No. 420506.....			184.85
Deficiency of income tax.....			\$ 3,120.38

Since no excess profits tax has been filed for this year, your excess profits net income has been determined as follows:

Income:

(a) Net income adjusted, as above.....	\$29,874.50
(b) 50% of interest on borrowed capital.....	29.16
Total	\$29,903.66
Less: (c) Declared value excess profits tax.....	3,778.43
Excess profits net income.....	\$26,125.23

Computation of Excess Profits Credit

Money paid in for stock.....	\$94,600.00
Accumulated earnings and profits.....	398.67
Average borrowed invested capital.....	515.39
Invested capital	\$95,514.06
Excess profits credit at 8% of \$95,544.06.....	\$ 7,641.12

Excess Profits Tax Computation

1. Excess profits net income.....	\$26,125.23
2. Less: Specific exemption	\$5,000.00
3. Excess profits credit.....	7,641.12
4. Adjusted excess profits net income.....	\$13,484.11
5. 90% of Item 4.....	12,135.70
6. Less: Credit for debt retirement, 40% of \$2,061.54.....	824.62
7. Correct excess profits tax liability.....	\$11,311.08
8. Previous assessment	None
9. Deficiency in excess profits tax.....	\$11,311.08

Twin Oaks Company vs.

Taxable Year Ended December 31, 1944

Adjustments to Net Income

Net income as disclosed by return.....	\$	559.42
Unallowable deductions and additional income:		
(a) Other income	\$52,302.35	
(b) Long-term capital gain.....	116.67	52,419.02
Net income adjusted.....		<u>\$52,978.44</u>

Explanation of Adjustments

- (a) See Item (a), 1942, above.
 (b) See Item (c), 1942, above.

Computation of Tax

Declared Value Excess-Profits Tax Computation

Net income adjusted.....	\$52,978.44		
Less: Net long-term capital gain.....	116.67		
Net income for declared value excess- profits tax computation.....			<u>\$52,861.77</u>
Less: 10% of \$25,000, value of capital stock as declared for the year ended 6-30-44.....			<u>2,500.00</u>
Net income subject to declared value excess-profits tax.....			<u>\$50,361.77</u>
Portion	Amount	Rate	Tax
5% of declared value of capital stock (but not more than L. 3).....	\$ 1,250.00	6.6%	\$ 82.50
4. Balance	49,111.77	13.2%	6,482.75
5. Total declared value excess-profits tax.....			<u>\$ 6,565.25</u>
6. Declared value excess-profits tax assessed, Account No. 4200582.....			None
7. Deficiency of declared value excess-profits tax.....			<u>\$ 6,565.25</u>

Income Tax Computation—Normal-Tax Net Income Computation

Net income for declared value excess-profits tax computation	\$52,861.77	
Add: Excess of net long-term capital gain over net short-term capital loss.....	116.67	
Total	<u>\$52,978.44</u>	
Less: Declared value excess-profits tax.....	6,565.25	
Net income	<u>\$46,413.19</u>	
Less: Adjusted excess profits net income.....	28,728.50	
Normal tax and surtax net income.....		<u>\$17,684.69</u>

Computation of Income Tax
Alternative Method

Normal tax and surtax net income.....	\$17,684.67
Less: Net long-term capital gain.....	116.67
Ordinary income subject to income tax.....	\$17,568.00
Normal tax at 15% on \$5,000.00.....	\$ 750.00
Normal tax at 17% on \$12,568.00.....	2,136.56
Surtax at 10% on \$17,568.00.....	1,756.80
25% of net long-term capital gain.....	29.17
Total income tax liability.....	\$ 4,672.53
Income tax assessed, Account No. 4200582.....	139.85
Deficiency in income tax.....	\$ 4,532.68

Since no excess profits tax return has been filed for this year, your excess profits net income has been determined as follows:

Income:

(a) Net income, adjusted, as above.....\$52,978.44

Less:

(b) Net long-term capital gain.....\$ 116.67
(c) Declared value excess-profits tax..... 6,565.25 6,681.92

Excess profits net income.....\$46,296.52

Excess Profits Tax Computation

1. Excess profits net income.....	\$46,296.52
2. Less: Specific exemption	\$10,000.00
3. Excess profits credit, 8% of \$94,600....	7,568.00 17,568.00
4. Adjusted excess profits net income.....	\$28,728.52
5. 95% of Item 4.....	\$27,292.09
6. Less: Current credit.....	2,729.21
7. Correct excess profits tax liability.....	\$24,562.88
8. Previous assessment	None
9. Deficiency in excess profits tax.....	\$24,562.88

Filed T.C.U.S. December 24, 1947.

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies that he erred in his determination as set forth in the notice of deficiency from which petitioner's appeal is taken. Specifically denies that he erred in the manner and form alleged in paragraph 4(a) to (f), inclusive, of the petition.

5(a). For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5(a) of the petition.

(b) and (c). Denies the allegations contained in paragraph 5(b) and (c) of the petition.

(d). Admits the allegations contained in paragraph 5(d) of the petition.

(e). Denies the allegations contained in paragraph 5(e) of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinabove specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the petitioner's appeal be denied and that the Commissioner's determinations of deficiencies and penalties be approved.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal
Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel,
JOHN H. PIGG,
R. G. HARLESS,
Special Attorneys,
Bureau of Internal
Revenue.

Received and filed T. C. U. S. February 23,
1948.

Before The Tax Court of The United States

Docket No. 16845

In the Matter of:

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

(Met pursuant to notice)

Before: Honorable Luther Johnson,
Judge.

Appearances:

CARL E. DAVIDSON, ESQ.,

1525 Yeon Building,

Portland, Oregon,

appearing on behalf of the Petitioner.

RALPH R. BAILEY, ESQ.,

723 Pittock Block,

Portland, Oregon,

appearing on behalf of the Petitioner.

JOHN H. PIGG, ESQ.,

appearing on behalf of the Commissioner
of Internal Revenue, Respondent. [1*]

* Page numbering appearing at top of page of original Reporter's Transcript.

PROCEEDINGS

The Court: The Clerk will call the calendar.

The Clerk: Docket No. 16845, Twin Oaks Company.

Mr. Davidson: Carl E. Davidson and Ralph R. Bailey, for the Petitioner.

Mr. Pigg: John H. Pigg for the Respondent.

Mr. Davidson: I would like to move the Court to withdrawal of Spencer R. Collins as counsel for the Petitioner, substituting my own entry, as well as the appearance of Mr. Bailey.

The Court: The motion is granted. Does counsel wish to make a statement of the nature of the case involved?

Opening Statement on Behalf of the Petitioner

By Mr. Davidson:

This involves the corporation income declared profits and declared excess profits asserted against the Twin Oaks Corporation for the year 1942. The facts in the case are, briefly, these:

Prior to January 2, 1941, a corporation by the name of Twin Oaks Builders Supply Company was in the lumber and builders' supply business, with a principal place of business in Eugene, Oregon. The stock of that corporation was owned one half by Mr. Rogers, and the other half by Mr. and Mrs. Scharpf, but out of that half owned by Mr. and Mrs. Scharpf, Mrs. Scharpf had acquired forty-six per cent and the remainder belonged to Mr. Scharpf, or four per cent. Now, Mr.

Scharpf [2] desired to have a greater interest in the business and insisted upon the company being dissolved, or, rather, upon the formation of a partnership where he could have equal interest in the company, and Mrs. Scharpf was agreeable to that. So, the corporation, after due consultation between the stockholders, was retained as a holding company, holding certain real property and office equipment. Accordingly, a new partnership was formed under the name of Twin Oaks Builders Supply Company, the name of the corporation being changed to Twin Oaks Company, its present name. That partnership purchased from the corporation the inventory and inventory values, which were cost or market, whichever was the lesser; also delivery equipment at book value, accounts receivable at face value, and took over the cash at face value.

The Court: Was it a partnership or a corporation which owned the assets?

Mr. Davidson: A corporation, Your Honor. The partnership then entered into an agreement with the corporation for the rental of its property at \$250 a month, which was the value of the rental, a fair rental value; the business was thereafter conducted in the name of the partnership. The corporation continued as a holding company and collected rental upon its assets.

The Commissioner in this case has attacked the partnership, disallowing the status of both the wives as members [3] of the partnership. A de-

iciency notice was filed, and the tax was paid, on that basis.

The Court: What year?

Mr. Davidson: For the years 1942, 1943 and 1944. The tax is really the income for 1944, but it involves the income for those three years. Notwithstanding that, the Respondent has determined that all the income shall be taxed to the corporation for all purposes. The basis upon which the Respondent has made this claim is shown in the letter accompanying the deficiency notice, and the pertinent part of that letter reads as follows: "It has been determined that the transactions by which (1) a partnership purported to be organized, or formed, under the name of Twin Oaks Builders' Supply Company, (2) your corporation purported to transfer certain of its properties to the alleged partnership and (3) your corporation purported to lease its real estate, buildings, furniture and fixtures to the alleged partnership, are without substance and are to be disregarded for federal income tax purposes. Accordingly, the net income derived from the operation of the business conducted in the name of the Twin Oaks Builders' Supply Company for each of the years 1942, 1943 and 1944 has been included in your taxable income for each of said years." It is our contention that these assets were purchased at fair market value, and that the properties of the corporation were leased at a fair rental value, and [4] that no transactions have been conducted by the corporation

so far as the sale of merchandise is concerned or any business, since that time; and upon that basis, the proper tax is to be on the members of the partnership.

Opening Statement on Behalf of the Respondent

By Mr. Pigg:

If the court please, I think counsel has given the court a fair picture of the background out of which the controversy arises, the issue being whether the income derived from the business carried on under the name of the purported partnership, the Twin Oaks Builders' Supply Company, for each of the years 1942, 1943 and 1944, is attributable to and should be included in the taxable income of this corporation, the Petitioner for those taxable years.

I would like to address myself next to counsel's observations insofar as they were directed to any determination or action of the Commissioner that is not directly involved in this proceeding, that is, to the determination or action as to which the partners, as such, were notified and by proper deficiency notice, that the partnership was not recognized for tax purposes insofar as their respective wives were purported to be partners, and proposing to tax the income attributable to the wives under the partnership arrangement to the husbands.

The court has no doubt already and no doubt it will be observed before the close of this proceed-

ing, that this was an action taken by the Respondent for the purpose of [5] protecting the revenue in the Government's interest. Insofar as those actions were inconsistent with the determinations as here made, the remedy of the parties involved, that is, the stockholders of this Petitioner corporation and the corresponding partnership under the partnership arrangement, is by way of claim of refund if they have paid the tax.

Mr. Davidson has read to the court the paragraph of the deficiency notice, that is, the statement which accompanied the deficiency notice, which contains the essence of the Commissioner's determination in this case, and, consistent with that determination, it is the position and contention of the Respondent that his determination here should be sustained, because, as we believe will be shown by the evidence, this purported partnership was merely a tax-saving device, looking into business realities, whereby the Petitioner sat and seeks to channel its income not only to its stockholders, as such, but to the members of the immediate family.

Another principle upon which the Commissioner here relies is that, although the taxpayer may be allowed to choose whatever way he likes for the carrying on of his business, the Government is not required to acquiesce in the form so elected by the taxpayer, and it may require a look into the actualities, and if it is determined that the form that is so elected by the taxpayer is a sham

or lacking in reality, or fiction, the Government may accept or disregard the fiction [6] as best suits the purposes of the tax statute.

We believe it will be further shown that the arrangement which will be shown in this case are tantamount to an anticipatory arrangement, that is, an anticipatory assignment of income; and it is our contention that any anticipatory assignment of income, through whatever form or whatever guise it may be accomplished, that does not absolve the Petitioner from tax liability, on the further ground that the economic realities not the legal formalities determine the tax competency, and that income is taxable to its creator or controller and not to its collector or beneficiary.

The determination in this case is not predicated upon Section 45 of the Internal Revenue Code, which relates to the election as between one taxable entity and another, and certain items of income and certain items of deduction in order to determine the true income. The determination here is that the alleged partnership is without substance and should be disregarded, and therefore there is no taxable entity for the purpose of recognition, or the application of the provisions of Section 45. However, I did not mean to undertake, if I could, to waive any provision of Section 45 or any other section of the Code. That I could not do if I attempted to. If it should appear, upon the conclusion of the evidence in this case, that Section 45 has any application, the Commissioner,

of course, may rely on that section if it appears proper, and [7] to the extent that it is proper; but it is certain that any such reliance would be in the alternative. I think that is all I have.

Mr. Davidson: Your Honor, I have a number of exhibits which counsel has consented may be introduced without objection.

The Court: You have a stipulation of facts?

Mr. Davidson: We have been unable to arrive at a stipulation of facts.

Mr. Pigg: Let the record show that it is not the result of any inability on the part of counsel to get along, but there just are not enough hours in the day, or days in the week.

Mr. Davidson: Your Honor, counsel wishes to stipulate that these exhibits may be introduced without further identification, and without objection, it being understood that counsel is not bound by any descriptive words in any caption, particularly relating to any determination by the Respondent that the corporation, or heading of "partnership" is a concession that there was a bona fide partnership.

Mr. Pigg: And that extends to the word "partnership" or similar words throughout the trial, and we consent to its use merely for identification purposes.

Mr. Davidson: We offer as Petitioner's Exhibit 1 a statement of the balance sheets of the Twin Oaks Company, the corporation, for the years ending 1935 to 1944, inclusive, including a state-

ment of bookkeeping entries upon transfer of [8] the assets to the Twin Oaks Builders' Supply Company, a partnership, in January of 1941; that is, the balance sheet on January 1, 1941, giving effect to that transfer.

The Court: In other words, what you have just said is contained in Petitioner's No. 1?

Mr. Davidson: That is right.

The Court: It will be admitted and marked as Petitioner's 1.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 1.)

Mr. Davidson: We offer as Petitioner's Exhibit No. 2, the income statement of the Twin Oaks Company for the calendar years 1941 to 1944, inclusive.

The Court: It will be admitted and marked as Petitioner's 2.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 2.)

Mr. Davidson: We offer as Petitioner's 3, a statement of the income account in the sales of the Twin Oaks Company, then known as Twin Oaks Builders' Supply Company, for the calendar years 1935 to 1940, inclusive.

The Court: It will be admitted and marked as Petitioner's 3.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 3.) [9]

Mr. Davidson: As Petitioner's 4, we offer the balance sheet of the Twin Oaks Builders' Supply Company, a partnership, as of January 1, 1941, and as of December 31 of each year, that is, 1941 to 1944, inclusive.

The Court: It will be admitted and marked as Petitioner's 4.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 4.)

Mr. Davidson: As Petitioner's 5, we offer a statement of the income account of the Twin Oaks Builders' Supply Company, a partnership, for the calendar years 1941 to 1944.

The Court: It will be received and marked as indicated.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 5.)

Mr. Davidson: As Petitioner's 6, we offer a statement of the analysis of the partners' investment accounts of the Twin Oaks Builders' Supply Company from January 1, 1941, through December 31, 1944.

The Court: It will be admitted and marked as Petitioner's 6.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 6.)

Mr. Davidson: And as Petitioner's Exhibit No. 7, we offer a statement of the original capital in-

vestments of [10] the partners of the Twin Oaks Builders' Supply Company, a partnership, at January 1, 1941.

The Court: It will be admitted and marked as Petitioner's 7.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 7.)

Mr. Davidson: As Petitioner's 8, we offer a copy of the minutes of the special meeting of the stockholders of Twin Oaks Builders' Supply Company, which was held on January 2, 1941.

The Court: It will be received in evidence and marked as Petitioner's Exhibit No. 8.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 8.)

Mr. Davidson: As Petitioner's Exhibit No. 9, we offer a copy of the minutes of the special meeting of the Board of directors of the Twin Oaks Builders' Supply Company, a corporation, dated January 2, 1941.

The Court: It will be received and marked as indicated.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 9.)

Mr. Davidson: And as Petitioner's Exhibit No. 10, we offer the statement of notes receivable by the Twin Oaks Company, a corporation, from the Twin Oaks Builders' Supply [11] Company, a part-

nership, showing the balance on January 1, 1941; also the dates and amounts of the subsequent payments of both interest and principal, with the remaining balance after the making of each of the payments.

The Court: It will be received and marked as Petitioner's 10.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 10.)

Mr. Davidson: As Petitioner's 11, we offer a photostatic copy of the note dated January 2, 1941, made between,—from the Twin Oaks Builders' Supply Company, a partnership, to the Twin Oaks Company, a corporation, in the amount of \$89,378.35.

The Court: It will be received in evidence and marked as Petitioner's 11.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 11.)

Mr. Davidson: And as Petitioner's Exhibit 12, we offer a photostatic copy of a note dated January 2, 1942, from the Twin Oaks Builders' Supply Company, a partnership, to the Twin Oaks Company, a corporation, in the amount of \$78,330.95. I don't know whether I stated it was January 2, 1942, but that is the date of it.

The Court: It will be received and marked as indicated. [12]

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 12.)

Mr. Davidson: It is stipulated that Petitioner's 12 is a renewal note for Petitioner's 11.

The Court: Is that so stipulated?

Mr. Pigg: We so stipulated.

The Court: It will be noted.

Mr. Davidson: As Petitioner's Exhibit No. 13, we offer a photostatic copy of a note from the Twin Oaks Builders' Supply Company, a partnership, to the Twin Oaks Company, a corporation, dated December 31, 1942, in the amount of \$55,-296.14. Counsel stipulates that is a renewal of Petitioner's Exhibit 12.

The Court: Does Respondent agree, and is it so stipulated?

Mr. Pigg: It is so stipulated.

The Court: It will be noted.

Mr. Davidson: We offer that in evidence as Petitioner's 13.

The Court: It will be received and marked as Petitioner's 13.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 13.)

Mr. Davidson: As Petitioner's Exhibit 14, we offer a statement of the rentals received by the Twin Oaks Company [13] from the Twin Oaks Builders' Supply Company, that is, received by Twin Oaks Company, the corporation, from Twin Oaks Builders' Supply Company, the partnership, showing the amounts of payments by years, from

the year 1941 to 1944, inclusive, and by months or shorter periods thereafter.

The Court: It will be admitted and marked as Petitioner's 14.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 14.)

Mr. Davidson: As Petitioner's 15, we offer a copy of the partnership agreement dated January 1, 1941, executed on January 25, 1941, between John J. Rogers, Louis C. Scharpf, Eva M. Scharpf and Corabelle Rogers.

The Court: It will be received and marked as Petitioner's 15.

(The Document referred to was marked and received in evidence as Petitioner's Exhibit 15.)

Mr. Davidson: As Petitioner's 16, we offer a *copy a* supplement to the partnership agreement of Twin Oaks Builders' Supply Company, which was executed on January 30, 1941, made as of January 1, 1941, between John J. Rogers, Corabelle M. Rogers, Louis C. Scharpf and Eva M. Scharpf.

The Court: It will be received and marked as indicated.

(Whereupon the document referred to was marked and received in evidence as Petitioner's Exhibit 16.) [14]

Mr. Davidson: As Petitioner's Exhibit 17, we offer a contract of lease into January 2, 1941, between the Twin Oaks Company, the corporation,

as lessor and the Twin Oaks Builders Supply Company, a partnership, as lessee, *consisting John J. Rogers, Corabelle M. Rogers, Louis C. Scharpf and Eva N. Scharpf.*

The Court: It will be received and marked as indicated.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 17.)

Mr. Davidson: As Petitioner's 18, we offer a transcript of the stock record book of the Twin Oaks Company, a corporation, reflecting stock issued prior to January 1, 1941, issued and outstanding to January 1, 1945.

The Court: It will be received and marked as Petitioner's 18.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 18.)

Mr. Davidson: As Petitioner's 19, we offer a copy of an assumed business name certificate filed by John J. Rogers, L. C. Scharpf, Corabelle M. Rogers and Eva N. Scharpf, dated January 2, 1941. And it is stipulated, I understand, it was filed in the County records of Lane County, Oregon.

The Court: Is it stipulated?

Mr. Pigg: Yes. [15]

The Court: What was the date it was filed?

Mr. Davidson: I will see.

The Court: Is that Exhibit 19?

Mr. Davidson: Yes. It is stipulated between counsel that this certificate was filed in the county

records of Lane County, Oregon, on January 18, 1941.

Mr. Pigg: It is so stipulated.

The Court: It will be received as designated.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 19.)

Mr. Davidson: As Petitioner's Exhibit 20, an official statement showing officially recorded Building Permits for the years 1914 to 1947, inclusive.

The Court: It will be received and marked as indicated.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 20.)

Mr. Davidson: As Petitioner's 21, we submit a copy of the notification by John J. Rogers, L. C. Scharpf, Eva N. Scharpf and Corabelle M. Rogers to the First National Bank of Eugene, Oregon, constituting a continuing ability to carry on banking transactions, being dated January 27, 1944.

The Court: It will be received in evidence and marked as indicated.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 21.)

Mr. Davidson: As Petitioner's 22, we submit a statement carrying the opening journal entries on January 1, 1941, of the books of the Twin Oaks Builders Supply Company, a partnership.

The Court: It will be received in evidence and marked as Petitioner's 22.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 22.)

Mr. Davidson: That is all the exhibits I have to offer at this time.

The Court: You may proceed with the testimony

Mr. Davidson: I would like to call Mr. L. C. Scharpf.

Whereupon,

LOUIS C. SCHARPF

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Will you state your name?

A. Louis C. Scharpf.

Q. Where do you reside, Mr. Scharpf?

A. Eugene, Oregon.

Q. Are you connected with the Twin Oaks Company, the Petitioner in this case? [17]

A. Yes, I am.

Q. Are you connected with the Twin Oaks Builders Supply Company, a partnership? A. Yes.

Q. What is your position in the Twin Oaks Company, a corporation?

A. I am secretary-treasurer.

Q. Are you a stockholder of that corporation?

A. Yes.

Q. What number of shares of stock do you own?

A. Well, thirty six and three tenths shares.

(Testimony of Louis C. Scharpf.)

Q. What percentage of the total issued and outstanding stock is that?

A. It is a little less than four per cent.

Q. What is your position in the Twin Oaks Builders Supply Company, a partnership?

A. I own one fourth interest.

Q. The other partners in the partnership are who?

A. John J. Rogers, Eva M. Scharpf and Corabelle N. Rogers.

Q. Eva M. Scharpf is your wife?

A. Yes.

Q. And Corabelle N. Rogers is the wife of Mr. Rogers? A. Yes.

Q. When did you first become connected with the [18] corporation now known as the Twin Oaks Company? A. 1926.

Q. What was the name of the corporation at that time?

A. It was Twin Oaks Lumber Company.

Q. In what manner did you first become connected with that company?

A. Mrs. Scharpf bought a large majority of the stock from a fellow by the name of Vick Anderson, and I bought one share at the time, which was a half interest in the lumber company.

Q. The purchases by you and Mrs. Scharpf were a half interest in the lumber company?

A. Yes.

(Testimony of Louis C. Scharpf.)

Q. You bought one share, and she bought the balance? A. Yes.

Q. Did Mrs. Scharpf have separate funds of her own with which to buy the stock? A. Yes.

Q. How did she get it?

A. She inherited a little fortune from her mother.

Q. And did all the money that she put into the stock purchase come from her separate funds?

A. That is right.

Q. When was the name of the corporation changed from Twin Oaks Lumber Company? [19]

A. That was probably about 1929 or 1930. It was at the time we took on the agency for the Roebling Wire Rope Company, and they would not sell us any wire rope as long as we had the name "lumber" connected with the company.

Q. When was the name changed?

A. About 1929 or 1930, I don't remember exactly.

Q. And what was the name changed to?

A. We changed it to "Twin Oaks Builders Supply Company."

Q. And when was it changed again?

A. It was changed again on January 1, 1941, when we formed the partnership and used the corporation as a holding company.

Q. Whose idea was it to form the partnership?

A. It was my idea.

Q. Why did you want to form the partnership?

(Testimony of Louis C. Scharpf.)

A. Well, I was a very minor stockholder in the corporation, holding less than four per cent of the stock, and I finally became rather discouraged about having such a minor interest in the company, and finally proposed to Mr. Rogers that we form a partnership in which I wanted a one fourth interest, and to buy out the assets of the Twin Oaks Builders Supply Company, a corporation.

Q. Did Mr. Rogers agree to that proposition?

A. Well, not for a long time. We argued about it for a year or more, and finally he came back with a proposal that [20] he would want to retain the corporation as a holding company for the real estate.

The Court: For what?

The Witness: For the real estate; and that he was agreeable to forming a partnership to operate the business, selling the merchandise, and so on.

Mr. Davidson: Was that satisfactory to you?

The Witness: Well, it was finally agreed on, on a compromise; that was the gist of it, and we formed the partnership with the four of us, each having an equal interest.

The Court: What was the interest of each of the four of you?

The Witness: One fourth interest.

The Court: All equal owners?

The Witness: Yes. My first idea was that it would be Mrs. Scharpf one fourth, myself one fourth and Mr. Rogers one half, and then after he

(Testimony of Louis C. Scharpf.)

made the suggestion that his wife come in as one of the partners, we agreed to that; and I agreed to the idea to have the corporation to stand as a corporation. It was as early as 1938 or 1939 that we were talking about the proposition. At that time the State Highway Commission was talking about surveys through our property, and in 1940 they made a survey right through our property, right through one corner of it, and also through our property at Cottage Grove. So I thought it was all right, that the [21] corporation wouldn't have much anyway, and that it would wind up in a short time. I thought the Highway Department was going to take our property, anyway, so it was all right to leave that in the corporation.

Q. How were the assets acquired from the corporation? A. How were they acquired?

Q. How did the partnership acquire the assets of the corporation?

A. The four partners put in two thousand dollars apiece making a total of eight thousand dollars capital, and then we gave a note for the balance, which amounted to, I think, eighty nine thousand and some odd dollars.

The Court: When you say "we," do you mean all the four partners?

The Witness: It was a note signed by the Twin Oaks Builders Supply Company, the partnership, and of course all the partners were liable on it, so far as that goes.

(Testimony of Louis C. Scharpf.)

Q. (By Mr. Davidson): I hand you Petitioner's Exhibit No. 11, and I will ask you if that is the note that was given for the initial payment,—a copy of the note (hands document to witness).

A. That is the one, yes.

Q. What assets did the partnership take over from the corporation?

A. Well, they took over all the assets except the real [22] estate and the furniture and the fixtures. In other words, they took over the assets, such as the stock of merchandise, the book accounts, the trucks, the cash on hand, the cash in the bank, and assumed the accounts payable and all the debts of the corporation.

Q. At what price did the partnership take over the inventory?

A. It was taken over at our usual manner of inventory, at cost or market.

Q. Whichever was the lower?

A. That is right.

Q. Did you consider that was a fair price for the inventory at the time? A. Yes.

Q. At what price did you take over the trucks?

A. At the book value.

Q. Did you consider that a fair price?

A. Yes.

Q. At what price did you take over the accounts receivable of the corporation?

A. One hundred cents on the dollar.

Q. Did you consider that a fair price?

(Testimony of Louis C. Scharpf.)

A. I figured that was more than a fair price.

Q. What are the physical characteristics of the real property that the corporation was occupying? In other words, [23] what did it consist of?

A. Well, it was a lumber shed and a warehouse, with a vacant lot in Eugene. It was a small lumber shed in Junction City, and a store building there which we rented; in Cottage Grove it was a warehouse and two vacant lots, in which at one time we operated a store.

Q. At the time of the purchase the Cottage Grove store was vacant? A. That is right.

Q. Did the partnership acquire the right to occupy the Cottage Grove property? A. Yes.

Q. Did they acquire the right to occupy the Eugene property? A. Yes.

Q. And the Junction City property?

A. Yes.

Q. You say the Junction City property was not owned by the corporation but rented by the corporation?

A. Well, the main building, the concrete building that we had the store in, that was owned by a Mrs. Cook, and we had it leased from her.

Q. What did the partnership do with the lease?

A. They carried it on.

Q. Did the partnership thereafter pay the rent?

A. Yes.

Q. What did the balance of the Junction City property consist of?

(Testimony of Louis C. Scharpf.)

A. It consisted of several lots in back of the store, on which there was a one-story lumber shed.

Q. A one-story lumber shed? A. Yes.

Q. Was there a large investment there?

A. No.

Q. About how much?

A. Several thousand dollars.

Q. What do you mean by "several"?

A. How is that?

Q. What do you mean by "several"?

A. Well, I am guessing at it, I would say about three thousand dollars, maybe.

Q. And the Cottage Grove property was vacant at that time? A. Yes.

Q. Now, what rental did the partnership agree to pay to the Corporation? A. \$250 a month.

Q. Did you consider that a fair rental?

A. Yes.

Q. Now, taking over these assets, in whose name was the [25] merchandise purchased?

A. It was purchased in the name of the Twin Oaks Builders Supply Company, the partnership.

Q. In whose name were the sales made?

A. The same, Twin Oaks Builders Supply Company, the partnership.

Q. Did the Twin Oaks Builders Supply Company have the bank account? A. Yes.

Q. The partnership, that is? A. Yes.

Q. Did the corporation have a bank account?

A. Yes.

(Testimony of Louis C. Scharpf.)

Q. Were the funds to pay the liabilities of the partnership drawn from its bank account?

A. That is right.

Q. Did the corporation pay any of the operating expenses? That is, operating expenses of the partnership?

A. No sir.

Q. Did the partnership register with the various governmental authorities as an employing entity?

A. Yes, it did.

Q. What did the merchandise consist of?

A. The merchandise is lumber, coal, explosives, hardware, paint, roofing, nails, plaster, lime, cement; anything [26] that is used for the building game.

The Court: What was the aggregate value of this real estate that the corporation retained title to?

The Witness: Of the real estate?

The Court: Yes; what was its aggregate value?

The Witness: Well, as I remember, the book value was about \$37,000.

The Court: How did that compare with the merchandise that the partnership took over.

The Witness: I would say the merchandise would be larger than that.

The Court: Larger?

The Witness: Yes.

The Court: Much larger?

The Witness: Well, I don't remember that.

Q. (By Mr. Davidson): I hand you Petition-

(Testimony of Louis C. Scharpf.)

er's 22, received in evidence Mr. Scharpf, and ask you if you can tell from that as to the value of the purchase price at which the inventory was taken over (hands document to witness).

A. You want the total?

Q. Just the merchandise?

A. The merchandise?

Q. Yes. A. \$70,892.48. [27]

Q. Mr. Scharpf, I hand you a document marked for the purpose of identification as Petitioner's 23, will you identify that?

(The document referred to was marked as Petitioner's Exhibit No. 23 for identification.)

A. It is our notice of engaging in a hazardous occupation by the Twin Oaks Builders Supply Company, as filed with the State Industrial Accident Commission.

Q. With whom was that filed?

A. It was filed on behalf of the Twin Oaks Builders Supply Company, naming the partners, Louis C. Scharpf, Eva M. Scharpf, Corabelle M. Rogers and John C. Rogers as partners. It was filed with the State Industrial Accident Commission.

Q. Will you state whether that was signed by you and approximately the date it was dated?

A. On January 16, it was signed by the Twin Oaks Builders Supply Company, L. C. Scharpf, partner.

Q. Have you continued to carry the Industrial

(Testimony of Louis C. Scharpf.)

Accident Commission insurance with the State of Oregon? A. Yes.

Q. Have you carried it in the name of the partnership? A. Yes.

Mr. Davidson: I offer that in evidence.

Mr. Pigg: No objection.

The Court: It will be received and marked as [28] Petitioner's 23.

(The document referred to, heretofore marked as Petitioner's Exhibit 23 for identification, was received in evidence as Petitioner's Exhibit 23.)

Mr. Davidson: I would like to have another one marked here.

The Clerk: Petitioner's 24 for identification.

(The document referred to was marked as Petitioner's Exhibit No. 24 for identification.)

Q. (By Mr. Davidson): Mr. Scharpf, I hand you a letter which has been marked for identification as Petitioner's 24, will you tell me what that is (hands document to witness)?

A. That is a letter from the State Unemployment Compensation Commission at Salem, saying that our registration for unemployment compensation had been received and filed.

Q. And upon whose behalf was that registration made?

A. That was made on behalf of the Twin Oaks Builders Supply Company.

Q. The partnership?

(Testimony of Louis C. Scharpf.)

A. The partnership, yes.

The Court: What is the date of the letter?

Mr. Davidson: The letter is dated January 25, 1941. I would like to offer that in evidence.

The Court: Is there any objection? [29]

Mr. Pigg: No objection.

The Court: It will be received and marked as Petitioner's 24.

(The document referred to, heretofore marked as Petitioner's Exhibit 24 for identification, was received in evidence as Petitioner's Exhibit 24.)

Mr. Davidson: And I have another one here, also, which I would like to have the Clerk mark.

The Clerk: Petitioner's 25 for identification.

(The document referred to was marked as Petitioner's Exhibit No. 25 for identification.)

Q. (By Mr. Davidson): Mr. Scharpf, I hand you a document which has been marked for identification as Petitioner's 25. Will you tell me what that is (hands document to witness)?

A. This is a notice of employer's identification number issued by the Treasury Department, Bureau of Internal Revenue, of the Twin Oaks Builders Supply Company, a partnership, with the owners named as John J. Rogers, Corabelle N. Rogers, Louis C. Scharpf and Eva M. Scharpf, using the trade name of Twin Oaks Builders Supply Company, a partnership.

Q. By whom was that issued?

(Testimony of Louis C. Scharpf.)

A. That was issued by the Treasury Department, Internal Revenue Service.

Mr. Davidson: I offer that. [30]

The Court: Is there any objection?

Mr. Pigg: No objection.

The Court: It will be admitted and marked as Petitioner's 25.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 25 for identification, was received in evidence as Petitioner's Exhibit No. 25.)

Mr. Davidson: May I also have this identified?

The Clerk: Petitioner's 26 for identification.

(The document referred to was marked as Petitioner's Exhibit No. 26 for identification.)

Q. (By Mr. Davidson): Mr. Scharpf, I hand you a group of documents, which I pinned together and had marked for identification as Petitioner's 26. Will you identify those, please (hands documents to witness)?

A. These are all the employers contributions, or contribution reports issued by the State Unemployment Compensation Commission at Salem, Oregon.

Q. Would you say by whom these reports were made?

A. This one was made by the Twin Oaks Builders Supply Company.

Q. Are there any made by the Twin Oaks Company?

(Testimony of Louis C. Scharpf.)

A. Yes, there are; this one here is Twin Oaks Company (indicating). [31]

Q. Do these cover the period of 1941?

A. Yes; they are all 1941.

Mr. Davidson: I will offer that in evidence.

Mr. Pigg: No objection.

The Court: Are they all in one document, bradded together?

Mr. Davidson: Yes, they are firmly bradded together.

The Court: All right.

Mr. Davidson: I will offer this.

Mr. Pigg: No objection.

The Court: It will be received as Petitioner's 26.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 26 for identification, was received in evidence as Petitioner's Exhibit No. 26.)

Q. (By Mr. Davidson): Did the corporation and the partnership make separate reports of their payrolls for the purpose of employment taxes?

The Court: When?

Q. (By Mr. Davidson): For the year 1941?

A. Yes.

Q. And for subsequent years? A. Yes.

Q. Were any of the operating personnel of the partnership carried on the payroll of the corporation? [32]

(Testimony of Louis C. Scharpf.)

A. Mr. Rogers and I were on the payroll in 1941, of the corporation.

Q. What was your salary?

A. Fifty dollars a month.

Q. Each? A. Yes; Mr. Rogers and I.

Q. Did the corporation have any other employees? A. No.

Q. At any time? A. No.

Q. From 1941 to 1944? A. No.

(The document referred to was marked as Petitioner's Exhibit No. 27 for identification.)

Q. (By Mr. Davidson): I hand you a document which has been marked for identification as Petitioner's 27 (hands document to witness); will you tell me what that is?

A. That is the 1942 and 1943 tax receipt from Lane County for the Twin Oaks Builders Supply Company, the partnership, personal property.

Q. What did this tax receipt cover?

A. That would cover the stock of merchandise.

Mr. Davidson: I will offer that.

Mr. Pigg: No objection. [33]

The Court: It will be admitted as Petitioner's 27.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 27 for identification, was received in evidence as Petitioner's Exhibit No. 27.)

Mr. Davidson: I would like to have this marked, also. (Indicating document.)

The Clerk: Petitioner's 28 for identification.

(Testimony of Louis C. Scharpf.)

(The document referred to was marked as
Petitioner's Exhibit No. 28 for identification.)

Q. (By Mr. Davidson): I hand you a document which has been marked for identification as Petitioner's 28 (hands document to witness). Can you tell me what that is?

A. Well, this is an average demurrage agreement.

The Court: A what?

The Witness: An average demurrage agreement; demurrage for freight cars issued by the S. P. & S. Railroad Company.

The Court: Under what date?

The Witness: It is dated April 22, 1942.

Q. (By Mr. Davidson): In whose name?

A. It was to be effective in 1941.

Q. In whose name?

A. It was signed by the Twin Oaks Builders Supply [34] Company, L. C. Scharpf, partner.

Mr. Davidson: I will offer that.

Mr. Pigg: No objection.

The Court: It will be admitted and received in evidence and marked as Petitioner's 28.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 28, for identification, was received in evidence as Petitioner's Exhibit No. 28.)

Mr. Davidson: Your Honor, we have a Mr. Sweet, whose family lives some distance from here, and he is very much concerned with the flood, and

(Testimony of Louis C. Scharpf.)

Respondent's counsel has indicated he has no objection to my putting him on out of order, at this time, in order to accommodate Mr. Sweet.

Mr. Pigg: No objection.

Mr. Davidson: Mr. Scharpf, will you leave the stand for a few moments, while Mr. Sweet testifies?

The Witness: Surely.

(Witness excused.)

Mr. Davidson: Mr. Sweet.

Whereupon,

C. B. SWEET

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

[35]

By Mr. Davidson:

Q. Will you state your name?

A. C. B. Sweet.

Q. What is your business or occupation?

A. I am division manager for the Long-Bell Lumber Company.

Q. What particular division is under your charge? A. The retail department.

Q. How long have you been with the Long-Bell Lumber Company? Approximately 26 years.

Q. And in what departments?

A. 24 years in the retail department.

Q. Does the Long-Bell Lumber Company oper-

(Testimony of C. B. Sweet.)

ate retail lumber yards in Oregon? A. Yes.

Q. And does the Long-Bell Lumber Company operate a retail lumber yard in Eugene, Oregon?

A. Yes.

Q. And where is that yard located with reference to the yard of the Twin Oaks Builders Supply Company?

A. It is on the adjoining plot on High Street.

Q. What would you say as to how the Long-Bell yard compares in rental value with the Twin Oaks yard?

A. I would say they are very comparable. [36]

Q. And does the Long-Bell Lumber Company own that yard? A. Not the real estate, No sir.

Q. Does it rent the real estate?

A. It leases it.

Q. When was that lease entered into.

A. Oh, as near as I can remember, it was about 1944; possibly 1943; but I am not just sure about that.

Q. 1943 or 1944? A. Yes.

Q. What is the amount of the rental provided for in that lease? A. \$300.

Q. Per month? A. Yes.

Q. Who pays the taxes on the property?

A. The owner.

Q. Who pays the insurance on the property?

A. The owner.

Q. Who maintains the buildings?

A. The owner maintains the foundations, and

(Testimony of C. B. Sweet.)

we maintain the balance of it, other than the painting. The owner paints the building.

Q. Have you had any experience, Mr. Sweet, in the purchase of inventory of a going retail yard?

A. Yes.

Q. And did you so purchase the yard which you operate in Eugene? A. Yes.

Q. Will you state upon what basis such inventory is usually purchased?

A. We normally purchase it on the basis of cost or market, whichever is the lower.

Q. Is that the manner of inventorying in the retail yard? A. Yes.

Q. And did you inventory the Eugene yard that you purchased that way? A. Yes.

Mr. Davidson: You may cross examine.

The Court: Did the witness testify to the rental in this particular case?

Mr. Davidson: He testified, Your Honor, that the Twin Oaks Builders Supply Company yard was comparable in rental value to that which the Long-Bell Lumber Company occupies. He testified he is not an expert on rental, but that the property which he has rented was at \$300 a month.

The Court: And they are about the same.

Mr. Davidson: That is right.

The Court: You may cross examine. [38]

Cross-Examination

By Mr. Pigg:

(Testimony of C. B. Sweet.)

Q. Where is this lumber yard of the Long-Bell Lumber Company? In Eugene?

A. Where is it?

Q. Yes.

A. It is on High Street, 555 High Street; it is in the next block from the Twin Oaks Yard.

Q. What is the size of it in terms of square feet or lots, and so forth?

A. Of the Long-Bell Lumber Company yard?

Q. Yes; and as compared with the Twin Oak yard.

A. Well, I don't know how many lots are involved. It is a rather irregular piece of ground and runs a block in one direction, but it is very shallow in depth, rather pie shape; it is narrower at one end than at the other.

Q. You are referring to the Long-Bell property?

A. Yes.

Q. Do you know how many lots were involved or were owned by the Twin Oaks Builders Supply Company on January 1, 1941?

A. I have not the foggiest idea.

Q. Do you know the size and type of the buildings that were on there in January of 1941?

A. No; I had seen them, but I had paid no particular [39] attention to them; we were not in Eugene at that time.

Q. Had you in 1941, or at any other time, made any examination of the Twin Oaks Builders Supply Company for the purpose of comparing that prop-

(Testimony of C. B. Sweet.)

erty with the properties that you have described as belonging to the Long-Bell Company?

A. No sir.

Q. For the purposes of rental or otherwise?

A. No sir.

Q. Do you have any information or knowledge as to what the fair market value of the properties, —rental of the properties of real estate that belonged to the Twin Oaks Builders Supply Company in 1941, was? A. No, sir.

Q. Do you have any idea what the fair market value or rental value of the property was at that time? A. No sir.

Q. Did the Twin Oaks Company own any of the buildings or own all of the buildings, such as lumber sheds and facilities in 1941, in January, in Cottage Grove?

A. I would not have any idea what their holdings were.

Q. Does Long-Bell? A. Long-Bell?

Q. Yes. A. No sir.

Q. Don't they own certain facilities or buildings in [40] Junction City? A. No sir.

Q. And have not done so? A. No sir.

Q. So your testimony is to the effect that the rental values compare favorably, as a wild guess, or the best guess you can make?

A. Well, a man can look at two pieces of property while he is going down the street, and get some idea of their relative value.

(Testimony of C. B. Sweet.)

Q. Is that the basis on which you testified as to the value? A. Yes.

Mr. Pigg: That's all.

Redirect Examination

By Mr. Davidson:

Q. What are the terms of your lease?

A. Five years with an option.

Q. The lease is for five years at \$300 a month, with an option of another five years at \$300?

A. Yes.

Q. Was there an operating lumber yard when you took it over? A. Yes.

Q. Was it equipped for a lumber yard? [41]

A. Yes; it had been operating.

Q. Is it true, with some variations, that lumber yards, retail lumber yards, have considerable similarity?

A. Yes, I think most of them are somewhat alike; from the nature of the business they have to be.

Q. From the standpoint of your experience as a retail lumber yard operator, do you say, from a rental standpoint, a useful value standpoint for a retail lumber yard, that the property that you have under lease, and that which the Twin Oaks Company occupies are fairly comparable?

Mr. Pigg: I object to that on the grounds that it calls for a conclusion: no proper foundation laid.

(Testimony of C. B. Sweet.)

The Court: I think he has testified that. I think it is repetitious.

Mr. Davidson: Well, I wanted to emphasize it, Your Honor, that Mr. Sweet has had considerable experience so far as retail lumber yards are concerned.

The Court: Let us have the question.

(The pending question was read by the reporter, as follows:

“Question: From the standpoint of your experience as a retail lumber yard operator, do you say, from a rental standpoint, a useful value standpoint for a retail lumber yard, that the property that you have under lease, and that which the Twin Oaks Company occupies are fairly comparable?”) [42]

The Court: What is the answer to the question?

The Witness: Yes, I would say that I believe they are comparable.

Mr. Davidson: That is all.

Recross-Examination

By Mr. Pigg:

Q. Is your answer to the last question based upon the same considerations as the answer that you gave me on cross-examination, to which I directed your attention a while ago?

A. Yes, I think it is; I had no way of knowing exactly what they owned or did not own; I could only see what was being operated, and what they had to operate with.

(Testimony of C. B. Sweet.)

Mr. Pigg: That's all.

Mr. Davidson: That's all.

The Court: You may stand aside.

(Witness excused.)

The Court: We will take a ten minute recess.

(Whereupon a ten minute recess was taken.)

Mr. Davidson: I will recall Mr. Scharpf.

Whereupon,

LOUIS C. SCHARPF

recalled as a witness for and on behalf of the Petitioner, having been previously duly sworn, was further examined and testified as follows:

Further Direct Examination [43]

The Court: I don't know whether the witness has testified as to the date of his marriage, I don't suppose there is any question of community property involved.

Mr. Pigg: No question of community property is involved.

Q. (By Mr. Davidson): You testified why you wanted to operate the partnership, did you not?

A. Yes, I think so.

Q. Is there any other reason, which you have not given, as to why you wanted the partnership?

A. Yes, I had a definite reason; I wanted to get myself in a position, through a partnership, so that if I wanted to get out or dissolve it, I could get out.

Q. Mr. Scharpf, are you familiar with the prop-

(Testimony of Louis C. Scharpf.)

erty occupied by the Long-Bell Lumber Company at Eugene? A. Yes.

Q. What would you say, approximately, as to the area of that property, and how it compares with the area of the property occupied by the Twin Oaks Builders Supply Company—which they occupied in 1941?

A. Well, in 1941, we didn't own the same—
The Court: Speak louder.

The Witness: In 1941, we did not own that lot that divides our lumber shed from the warehouse; there was a big [44] two-story house in between. But, in frontage, it would be eighty and—we had, maybe, about 150 or 160 foot frontage on High Street. The Long-Bell property is an entire block.

Q. (By Mr. Davidson): How large is that?

A. I don't know.

Q. Greater than yours? A. Oh, yes.

Q. And, in general, how would the value of the improvements of the two properties compare, that is, yours in 1941 and theirs in 1943 and 1944 when they occupied them?

A. They had a shed over the entire block, the entire length. We had a warehouse on one side, and the lumbershed on the other side. But I would say the value was rather comparable.

The Court: I didn't hear what you said.

The Witness: The value was rather comparable.

(Testimony of Louis C. Scharpf.)

The Court: Was the size about the same? Was the size the same, the facilities, and so forth?

The Witness: As to location, I would say one was about as valuable as the other; we both used the same track; we have a track in back there that we both use.

Mr. Davidson: You may cross-examine.

Cross-Examination

By Mr. Pigg:

Q. Mr. Scharpf, did you say that the name of the [45] Petitioner corporation was changed from Twin Oaks Lumber Company to Twin Oaks Builders Supply Company, as a corporation?

A. Yes.

Q. When was that, Mr. Scharpf? About when?

A. It was, oh, about 1930.

Q. Wasn't it about 1935?

A. As to the exact year, I couldn't remember about that. It was at the time we took the agency for the Roebling Wire Rope; we had to take the name "lumber" out in order to get that agency.

Q. As I understand your testimony, the name of the Petitioner corporation has changed from Twin Oaks Builders Supply Company to the Twin Oaks Company, on or shortly after January 1, 1941?

A. That is right.

Q. I hand you Petitioner's Exhibit 8, which is a copy of the minutes of a special meeting of the stockholders of the Twin Oaks Builders Supply Company, held on January 2, 1941, the minutes be-

(Testimony of Louis C. Scharpf.)

ing signed John J. Rogers, President, and attested by L. C. Scharpf, Secretary. Is that your signature (indicating)? A. Yes.

Q. And Mr. Rogers was President?

A. Yes.

Q. And you were Secretary?

A. That is right. [46]

Q. Is this the meeting at which the change in the name of the corporation was made from Twin Oaks Builders Supply Company to Twin Oaks Company? Is that the time when the change was authorized?

A. Yes. The resolution right here (indicating).

Q. It so states there? A. Yes.

Q. And that was part and parcel of the general plan and the arrangements that were made at the time that the corporation turn over its name to the partnership, and that the partnership continue in the name of the Twin Oaks Builders Supply Company?

A. We wanted to keep that name for the partnership; we had been operating in that name.

Q. Why did you want to keep it for the operating end of the business?

A. Because all the customers were familiar with it.

Q. In other words, you had operated with a corporation of the same name, and had been engaged in the same business in the same community, in the same area, for a period of years, and you

(Testimony of Louis C. Scharpf.)

wanted to retain the customers who were familiar with that business? A. That is right.

Q. And they knew both Mr. Rogers and yourself, and your connection with the corporation prior to January 1, 1941 [47] didn't they?

A. Yes.

Q. Referring to Petitioner's 15, Mr. Scharpf, is that the partnership agreement executed January 25, 1941, as of January 1, 1941, is that right (hands document to witness)?

A. That is right.

Q. It was signed by several persons, including yourself, as Louis C. Scharpf, was it not?

A. Yes.

Q. And it was *signed* Mr. Rogers?

A. Yes.

Q. It was signed by all of you, by you, Mr. Rogers, Mrs. Rogers and Mrs. Scharpf.

A. That is right.

Q. And the business organization as contemplated by this exhibit 15—what was the organization which you testified it was desired to retain the name of?

A. I don't know that I understand your question.

Q. The name of the business organization which it was contemplated would subsequently carry on the business of the corporation—you wanted that name to still be the name "Twin Oaks Builders Supply Company"?

(Testimony of Louis C. Scharpf.)

A. That was the assumed name. That was the name for the partnership.

Q. That was the name of the corporation prior to that? [48] A. Yes.

Q. And this is the same business organization that you just stated a while ago you desired to have the advantage of, so far as the name was concerned, which has been used by the old corporation for its future business operations, is that correct? A. Yes; that is right.

The Court: Did the witness answer?

The Witness: Yes; that is right.

The Court: Speak a little louder, please.

Q. (By Mr. Pigg): Referring to Petitioner's Exhibit 16, which is a supplement to the partnership agreement being Exhibit 15, which I showed you. That is signed by the same parties as the previous exhibit, is it not? A. Yes.

Q. And Petitioner's Exhibit 17, which is a lease, dated January 2, 1941, how was that signed?

A. That was signed by the Twin Oaks Company, a corporation, by John J. Rogers, President, and myself as secretary, and the Twin Oaks Builders Supply Company, partnership, by Louis C. Scharpf, Eva M. Scharpf, Corabelle N. Rogers and John J. Rogers, partners.

Q. Petitioner's Exhibit 22, Mr. Scharpf, which I hand you (hands document to witness) under the heading of "assets", [49] is that a list of the assets

(Testimony of Louis C. Scharpf.)

or items of property that were transferred from the corporation to the partnership at that time?

A. This is a list of the assets and a list of the liabilities.

Q. Those liabilities represent the liabilities as shown by the books of the corporation at that time, which were assumed by the partnership?

A. These are the accounts payable that we had for merchandise, \$16,271.55, which we assumed from the corporation.

Q. You agreed to pay that on behalf of the corporation? A. Yes.

Q. Opposite the names of John J. Rogers, Corabelle N. Rogers, Louis C. Scharpf and Eva M. Scharpf, the amount of \$2,000 appears with respect to each. What does that indicate, if you know.

A. That means the investment that we had made in the partnership.

Q. Why is that investment made?

A. It was in cash; it was a cash investment.

Q. Did you put \$2,000 in cash into the business at that time?

A. Well, I think that the corporation owed—not at that time all of that—which I turned in to pay for it, with a note. [50]

Q. You mean that the corporation owed you a note of \$2,000 or more at that time; is that what you mean?

A. No; they did not owe me \$2,000. As I remember it, it was two notes totaling about twelve

(Testimony of Louis C. Scharpf.)
or thirteen hundred dollars which the corporation owed me.

The Court: Speak a little louder. I cannot hear you when you let your voice fall.

Q. (By Mr. Pigg): I will withdraw Exhibit 22 and hand you Exhibit 17, Mr. Scharpf, and ask you if there appears on that exhibit the amounts to which you refer that were owing by the corporation to you on January 1, 1941, (hands document to witness)?

A. That shows the accrued salary.

Q. How much was that?

A. \$1,200; and dividends from the Twin Oaks Company, formerly the Twin Oaks Builders Supply Company, \$70.60 and cash that I borrowed from my son, \$729.40. That makes a total of \$2,000.

Q. In other words, the total of those amounts was regarded as the amount owing to you by the corporation?

A. Yes, \$1,200.

Q. \$1,200 represents the salary not drawn?

A. Yes.

Q. And the \$70.60 represents dividends that had been declared but not paid at that time? [51]

A. I suppose.

Q. And that seven hundred dollars and some represents what you said a while ago?

A. Yes. I borrowed that from my son.

Q. Now, a total of those three sums, that means the liability of the corporation to pay that indebt-

(Testimony of Louis C. Scharpf.)

edness to you—that was cancelled and written off the books at that time, was it not?

A. It is the same as a cash deal.

Q. Just answer my question. Is that what happened; that was written off the books of the corporation at that time, and it is thereafter described as a cash investment that you made in the partnership; is that right?

A. That is right.

Q. You were a party to this transaction, or to all of those transactions, were you not?

A. Yes.

Q. Insofar as the same Exhibit 17 purports to describe the information with respect to John J. Rogers, is the same thing true insofar as the cash investment of John J. Rogers in the partnership is concerned?

A. Only that he had a lot more dividends than I had.

Q. I mean to the extend of the \$2,000; was that written off the books of the corporation?

A. He had \$1,200 salary and a dividend of \$944, which [52] came to more than \$2,000.

Q. It was \$2,000, or whatever amount that was owing by the corporation to Mr. Rogers, which was written off the books of the corporation in like manner as you have explained with respect to yourself; isn't that right?

A. Yes.

Q. And Corabelle N. Rogers, whose name appears on Exhibit 17—there are two sums there.

(Testimony of Louis C. Scharpf.)

one of \$1,500 and one of \$500; what do they represent?

A. The \$1,500 represents a note that the Twin Oaks people, the old Twin Oaks Builders Supply owed her.

Q. And what does the \$500 item represent?

A. I don't know; it must be some money that she had borrowed from somebody; it says it was borrowed on a note.

Q. So far as the \$1,500 item is concerned, was that item written off the books of the corporation or cancelled insofar as it represented a liability of the corporation, in like manner and for the same reason that you explained a while ago?

A. Yes.

Q. Did or did not Mrs. Rogers actually put \$500 into the business of the partnership at that time?

A. Yes.

Q. You are sure of that?

A. Yes.

Q. And the name of Eva M. Scharpf, insofar the similar [53] information is shown with respect to the items \$873.40 and \$1,126.60 are concerned, what do they represent?

A. The \$873.40 represents the 1940 dividend which was cancelled—a liability—and the \$1,126.60 was cash that she turned in, that she borrowed from her son Bill.

Q. That was borrowed from the son Bill when?

A. Prior to this.

Q. She borrowed it from your son Bill at some

(Testimony of Louis C. Scharpf.)

time prior to the date, and then loaned it to the corporation?

A. No; she borrowed it from Bill.

Q. For what?

A. To pay the balance of the \$2,000.

Q. You mean by that, that Mrs. Eva M. Scharpf put \$1,126.60 into the partnership business at that time?

A. Yes.

Q. Are you sure of that?

A. Yes.

Q. Now, as I understand your testimony with respect to that exhibit, except for the \$500 item as to Corabelle N. Rogers and \$1,126.60 for Eva N. Scharpf, the balance of the material on there merely represents a cancellation of indebtedness as appears on the books of the corporation owing to the persons named on the exhibit?

A. No; you left out the \$729.40 that I paid in that I borrowed. [54]

Q. That also represents money that you paid in?

A. Yes, and which I borrowed from my son.

Q. Aggregating, again, \$729.40? What is your answer?

A. Well, the answer would be that the accrued salaries and dividends were cancelled as shown on this statement, were cancelled as a liability of the corporation and shown as capital on the partnership.

Q. And the fact is that those items do not actually represent amounts of cash paid into the

(Testimony of Louis C. Scharpf.)

partnership by the persons whose names appear on the exhibits; is that right?

A. If you mean writing out a check, that is right; it is the same as cash.

Q. Let us turn over to Exhibit 22. What is this item of \$89,378.35 which appears under the heading of "liabilities"? Can you tell me, if you know?

A. That is a note that the Twin Oaks Builders Supply Company gave to the Twin Oaks Company for the merchandise that we had bought, and the books of account, and the notes receivable, bills receivable, and so on.

Q. I hand you Exhibit No. 11, so that you will have in your hand both Exhibits 11 and 12, and I will ask you whether in Exhibit 11 that is the note to which you have just referred?

A. It is the note, and for the same amount.

Q. If I understand you correctly, the effect of your testimony is that the amount of the note, \$89,000 odd, represents [55] the difference between the total of the assets, \$113,649.90 and the accounts receivable item of \$16,291.55 and the four items of \$2,000 each, or \$8,000?

A. That makes a total of \$113,649.90.

Q. In other words, the \$16,000 plus the \$8,000, added to the \$89,000 dollars, in round numbers, equals the total of the liabilities of \$113,000?

A. The total of the assets.

Q. The total of the assets?

A. Yes.

Q. Now, these same assets that are listed on

(Testimony of Louis C. Scharpf.)

this exhibit are the same assets that were agreed to be transferred to the partnership under the partnership agreement; is that correct?

A. Yes.

Q. There were no other assets or properties transferred at that time, or agreed to be transferred at that time, were there?

A. Not that I know of; no sir.

Q. So that the corporation retained only whatever real properties, improved real properties, or to the extent that they were improved, at Eugene and Cottage Grove and Junction City, and then the furniture and fixtures and the facilities that were used or being used in the business?

A. It was all the assets with the exception of real [56] estate and furniture and fixtures.

Q. At those three places? A. Yes.

Q. And it was what was left that was covered by the lease agreement, in Exhibit 17; is that correct? A. That's right.

Q. Prior to January 1, 1941, had the Twin Oaks Builders Supply Company been engaged in the rental of real estate—in the business of renting real property? A. No, sir.

Q. After January 1, 1941, that was the only business in which it was engaged, isn't that right?

A. We are in the building supply business.

Q. I am speaking about the corporation. Except for the change in name on January 1, 1941, or as of that time, the only business in which the

(Testimony of Louis C. Scharpf.)

corporation was engaged after January 1, 1941, was the renting of this real property and business facilities thereon to the partnership?

A. No. Prior to January 1, 1941, the corporation was operating a builders supply business.

Mr. Pigg: Will you read the question to the witness, please?

(Whereupon the last question was read aloud by the reporter as above recorded.) [57]

Q. (By Mr. Pigg): Now, will you answer the question?

A. After January 1, 1941, that was all the business activity.

Q. Mr. Scharpf, you are familiar, I assume, with all the exhibits that have been placed in evidence in this case?

A. I think so; I couldn't say that I know about all of them, but I think so.

Q. Do you know that copies of the minutes of the stockholders meetings, copies of the minutes of the directors meetings, on or about January 2, 1941, were placed in evidence by agreement, don't you know that? A. Yes.

Q. Insofar as those exhibits refer to L. C. Scharpf or Louis Scharpf, and indicate your presence at those meetings, or where your signature is on the document, you are the person to whom they refer? A. Yes.

Mr. Pigg: I will ask that they be marked for identification as Respondent's A the corporation

(Testimony of Louis C. Scharpf.)

income declared value excess profits and defense tax return of the Twin Oaks Builders Supply Company for the year 1940.

The Court: It will be marked for identification as Respondent's A.

(The document referred to was marked as Respondent's Exhibit A for identification.)

Q. (By Mr. Pigg): As I understand your testimony at the outset of this hearing, insofar as it related to your reason to organize the partnership, it was that you were dissatisfied because you did not have a stock interest of fifty per cent, or equal to that of Mr. Rogers? That was about it?

A. Yes.

Q. At that time—I am referring to January 1, 1941—the stock outstanding represented about 946 shares—did it not? A. That is right.

Q. Mr. Scharpf, I hand you Petitioner's 18 and I will ask you if that correctly reflects or shows the stock holdings of the Petitioner corporation on January 1, 1941 (hands document to witness)? A. It does.

Q. So that you then held thirty-five and three-tenths shares? A. That is right.

Q. And Mrs. Rogers—Mrs. Scharpf, your wife, owned or held 437.7 shares? A. That's right.

Q. A total of 473 shares?

A. That's right.

Q. And Mr. Rogers owned or held the remain-

(Testimony of Louis C. Scharpf.)

ing fifty per cent, or the remaining 473 shares? [59]

A. That is right.

Q. Prior to January 1, 1941, did you hold a proxy for the purpose of voting the stock issued or standing in the name of Mrs. Scharpf?

A. I don't ever remember of holding a proxy.

Q. Prior to January 1, 1941, did the stockholders of the Petitioner corporation hold any stockholders meetings? A. Yes.

Q. For the purpose of declaring dividends or transacting other corporate business?

A. Yes, as shown in the minute books.

Q. Who attended those meetings?

A. There was usually Mrs. Scharpf, Mr. Rogers, myself, and Mr. E. R. Bryson.

Q. And who was Mr. Bryson?

A. He was a stockholder in there to make the third director.

Q. He was merely a nominal stockholder in there holding two shares? A. Yes.

Q. Two shares, which, in reality, belonged to Mrs. Scharpf?

A. Yes, and one to Mr. Rogers.

Q. He held the legal title and Mrs. Scharpf held the equitable title? [60]

A. That is right.

Q. Or the rights or whatever accrued under the stock? A. That is right.

Q. At your stockholders meetings, who voted the stock that was then outstanding in Mrs. Scharpf's name?

(Testimony of Louis C. Scharpf.)

A. Mrs. Scharpf voted her own.

Q. You mean that Mrs. Scharpf at all times voted the stock that stood in her name, prior to January 1, 1941? A. Yes.

Q. Did you and Mrs. Scharpf ever disagree prior to that time on how her stock should be voted, on any question that arose? A. No.

Q. So far as the rights that existed under the ownership of the stock she held, what is the fact as to whether or not Mrs. Scharpf voted the stock in accordance with your wishes or in accordance with your recommendations and ideas? Do you understand the question?

A. What was the question?

Mr. Pigg: Will you read the question?

(Whereupon the last question was read aloud by the reporter as above recorded.)

A. Well, it might be that—I may be dumb, but I don't know exactly what you mean.

The Court: Speak a little louder. [61]

A. I don't understand the question.

Mr. Pigg: I will change the question and re-frame it.

The Court: All right.

Q. (By Mr. Pigg): Did Mrs. Scharpf ever vote the stock contrary to your wishes?

A. No.

Q. Isn't it a fact, Mr. Scharpf, that prior to January 1, 1941, the business of the corporation was carried on, insofar as its affairs were con-

(Testimony of Louis C. Scharpf.)

cerned, by you and Mr. Rogers as though you were equal stockholders?

A. Well, it was just carried on in the ordinary course of a corporation's business; there was no equal stockholders there.

Q. You never had any quarrels or misunderstandings with Mr. Rogers as to the management of the business?

A. We had lots of them, but we generally ironed them out.

Q. You never had any that you didn't compose to your mutual satisfaction, did you?

A. That's right.

Q. You never had any such misunderstandings or disagreements, other than those which normally, in the course of operating a corporation's business, would arise with respect to [62] differences of opinion which might exist between the officers of a company; is that right?

A. I would say that is right.

Q. I hand you Exhibit A, or Respondent's Exhibit A for identification, Mr. Scharpf, and I will ask you if it is not, in fact, the return of the Petitioner corporation for the year 1940?

A. It appears to be.

Q. I will ask you if it does not bear your signature at the bottom?

A. Yes, it carried my signature.

Q. It carries your signature on the front page, does it not? A. Yes.

(Testimony of Louis C. Scharpf.)

Q. On page three of this same return, same exhibit, under schedule F, under the caption "Compensation of Officers", does that not indicate that you and Mr. Rogers each hold fifty per cent, or each held at that time, fifty per cent of the then outstanding capital stock of the Petitioner corporation?

A. No, I wouldn't say so. It says, time devoted to the business; we both devoted our entire time to the business.

Q. That is under the caption of "Time devoted to Business"? There is another caption "Percentage of Corporation Stock Owned."?

A. Yes. [63]

Q. And that is divided into a subheading underneath the general heading?

The Court: Is there any answer to that question?

Mr. Pigg: What is that?

The Court: The question that you asked?

Mr. Pigg: That is my next step, Your Honor.

Q. (By Mr. Pigg): Turning your attention to the column, and particularly referring to the number 4. That means common stock, does it not?

A. I presume so.

Q. It shows John J. Rogers owned fifty per cent and L. C. Scharpf owned fifty per cent, does it not?

A. That is wrong.

Q. Although that might not be correct insofar as the actual ownership of the stock was con-

(Testimony of Louis C. Scharpf.)

cerned, it represented, in general, the equal division of responsibilities in the conduct of the business between you and Mr. Rogers, did it not?

A. I would say that is just a typographical error.

Q. How long had Mr. Rogers been president of the Petitioner corporation prior to January 1, 1941?

A. Why, he came into the corporation in May of 1928.

Q. And he had been president all during that time? A. That is right. [64]

Q. You were secretary-treasurer of the corporation at the end of 1940, were you not?

A. Yes.

Q. How long have you held that office?

A. Since 1926 to the present time.

Q. And during the period which Mr. Rogers was president of the corporation, what were his duties or functions or responsibilities as president?

A. Mr. Rogers purchased the lumber and shingles and molding and coal, principally, and I looked after the——

Q. Just what Mr. Rogers did, as completely as you can tell me, first?

A. Well, as I said, he purchased the lumber, shingles, molding, coal, and he looked after the granting of credit and the collection of the accounts.

Q. Now, the same question as concerns your-

(Testimony of Louis C. Scharpf.)

self. I am speaking as of before January 1, 1941.

A. Well, I looked after the sales and bought all the other building materials items.

Q. So that you each had a more less definite classification of duties and responsibilities to perform for the corporation?

A. That is about the way we tried to divide it up.

Q. Well, now, after the execution of the partnership agreement, on January, 1941, what were the duties that were [65] performed by Mr. Rogers on behalf of the partnership?

A. They were buying the lumber, shingles, lath, and looking after the credit, and collecting accounts.

Q. In other words, the same as before?

A. Yes.

Q. Were your own duties, so far as they pertained to the carrying on of the business, the same after that as they had been before?

A. Yes; looking after the sales and buying all the rest of the merchandise.

Q. Was a complete new set of books opened as of January 1, 1941, Mr. Scharpf, if you know?

A. Yes.

Q. What was the difference in the designation of the business organization?

A. What do you mean?

Q. What symbols were there on those books to show that it was a corporation as distinguished

(Testimony of Louis C. Scharpf.)

from a partnership, or, rather, a partnership as distinguished from a corporation?

A. The partnership was the Twin Oaks Builders Supply, and the corporation was the Twin Oaks Company.

Q. On December 31, the corporation was also the Twin Oaks Builders Supply Company, wasn't it? A. Yes.

Q. In fact, it was also the Twin Oaks Builders Supply [66] Company on January 1, 1941?

A. Yes.

Q. Do you know the exact date the name was changed to the Twin Oaks Company?

A. Well, it was changed, I suppose, the second day of January, the first day after the legal holiday.

Q. That is the date of the stockholders resolution, but wasn't there something that had happened so far as the Corporation Commissioner of the State of Oregon was concerned, to carry the resolution into effect?

A. I think that was all taken care of.

Q. You mean it was all taken care of, those formalities, sometime prior to January 25, 1941?

A. Yes, that is right; we had that all settled.

Q. And January 25, 1941, was the date of the execution of the partnership agreement?

A. That is right.

Q. When did you first change your letterhead and bills and billheads, and so forth, to show that

(Testimony of Louis C. Scharpf.)

it was a partnership and not a corporation, if ever?

A. Well, I couldn't say as to that, except that we used up some of the old checks and some of the old stationery, instead of throwing it away, and when it ran out we ordered new.

The Court: I am sorry, I did not hear the last answer. [67]

The Witness: I said I didn't know exactly whether we ordered new stationery and checks and tickets like you mentioned, except I know that we used up some of the old sales tickets and checks instead of just throwing them away; we used them up as a matter of economy.

Mr. Pigg: Will counsel stipulate that the name of the Petitioner corporation was formally changed by appropriate action with the Corporation Commissioner of the State of Oregon on January 15, 1941?

The Court: Is that stipulated and agreed to between the parties?

Mr. Davidson: Yes. It is so stipulated.

The Court: Very well.

Q. (By Mr. Pigg): What was the difference, if any, in the wording that appeared on the letterheads after they were first ordered, or orders for new letterheads that were made after January 1, 1941? Do you know?

A. I don't think there would be any difference.

Q. Is that true also as to any bills, that is, the

(Testimony of Louis C. Scharpf.)

bills which were sent to the customers, and so forth?

A. I see no reason why they would be changed.

Q. So far as the customers of the corporation were concerned, they were still doing business with the same company, so far as you know? [68]

A. I don't think the customer pays any attention to who they are dealing with, whether it is a corporation or a partnership.

Q. After January 1, 1941, you still retained the same customers you had before that?

A. That's right.

Q. So far as those customers were concerned, so far as you knew and so far as you were aware, and so far as they were aware, according to your knowledge, they were dealing with the same business organization that they had always dealt with; isn't that a fact?

A. I don't know what they thought.

Q. What action did you ever take to put the customers on notice that that they were no longer dealing with the same business organization that they had formerly dealt with?

A. They were not given any notice, so far as the customers were concerned.

Q. You just let nature take its course, so far as that was concerned? A. Sure.

Q. Were there any meetings held prior to January 1, 1941, as which there was discussed the matter that led to the formation of the partnership,

(Testimony of Louis C. Scharpf.)

other than the stockholders minutes, which are already in evidence, reflect?

A. Well, I don't know of any other meetings unless [69] there would be an informal discussion between the interested parties.

Q. Did you ever discuss with anyone the subject of tax advantages that would accrue from the formation of the partnership?

A. No; I never thought of it.

Q. I beg your pardon? A. I did not.

Q. Is it your testimony here that you never discussed that with anyone prior to January 1, 1941?

A. That is right; all I was interested in was getting the partnership.

Q. You never discussed with anyone whomsoever the question of the tax advantage that might accrue from the creation of the partnership; is that your testimony?

A. I don't remember anything on that part.

Q. Do you know an accountant in Eugene, Oregon by the name of Mr. Collins? A. Yes.

Q. He is an accountant? A. Yes.

Q. He was your accountant?

A. Yes, he is our accountant.

Q. How long has he been your accountant?

A. Well, I don't know; probably ten or twelve years. [70]

Q. Anyway, it was long prior to the date which we have been talking about here? A. Yes.

(Testimony of Louis C. Scharpf.)

Q. And Mr. Collins handles your tax matters?

A. Yes.

Q. And makes out your tax returns?

A. Yes, he has.

Q. And he has done it for you for many years?

A. Yes.

Q. And is it your testimony that you never discussed with Mr. Collins prior to January 1, 1941, the subject of the tax aspect of the corporation and of the partnership?

A. Well, we naturally would talk about those things, about our earnings, that they were so small that there wasn't anything to figure on; it wasn't a thought at all, because our earnings were so small. It certainly wasn't anything that we figured on from a tax angle, whether we could save so much on this and so much on that. It wasn't anything like that.

Q. I hand you Petitioner's Exhibit 3, Mr. Scharpf, which has already been identified as the statement of the income accounts of the Twin Oaks Company for the years 1935 to 1940; is that correct? (Hands document to witness.)

A. That is right.

Q. And the last line at the bottom, and the figure on that line opposite "net income for the year", those figures, [71] as I understand it, are the figures that have been agreed to as the net income as shown by the books of the company for, those years?

(Testimony of Louis C. Scharpf.)

A. Yes.

Q. The company had a net income, according to its books, of \$6,036.35 for 1940 and for 1939 its net income was \$2,215.38, and for the preceding four years it had a small loss of \$500 for 1938, and a smaller income for 1935, 1936 and 1937; is that correct?

A. That is right.

Q. So that the business of the company was showing an improvement by the close of the year 1940?

A. It happened to be one fair year; but it was a very small profit though.

Q. It is a fact, is it not, that the business conditions, and particularly the demand for lumber was such as to make the prospects or expectations for future business rather favorable at that time; isn't that a fact?

A. I don't think anybody could tell.

Q. What is the fact, so far as you are concerned, at that time, did you think that conditions had a portent for the worse or better?

A. I couldn't say; I had no way of prophesying that.

Q. You don't know; is that the sum and substance of your answer, that you don't know? [72]

A. As I say, I had no way of prophesying what the business would be in the future.

Q. Is it customary and usual that the officers of the corporation, at the close of any fiscal year, or at the close of the business year, survey the

(Testimony of Louis C. Scharpf.)

business results for the past year and try to anticipate the future business?

A. Well, they might talk about it, but there is no real prophesying that. These earnings and sales of these years are very comparable; there isn't much difference.

Q. Mr. Scharpf, I hand you Petitioner's Exhibit 5, which is the agreed statement of the income account of the Twin Oaks Builders Supply Company for the years 1941, 1942, 1943 and 1944; is that correct? A. Yes.

Q. Now, what is the fact as to whether the net income of the corporation increased to a very considerable extent, beginning with the year 1941?

A. Well, it did increase.

Q. Well, it went to \$29,000 in 1941, did it not?

A. Well, whatever the figures show.

Q. And it dropped to \$18,000 in 1942 and up to \$66,000 in 1944? A. That's right.

Q. As I understood your testimony, in addition for the first stated reason for wanting to organize the partnership, [73] you further stated that, as another reason, you wanted to get your business in such a shape that if you wanted to dispose of it and get out, you could do so; is that right? A. That's right.

Q. And you would be an independent agent?

A. You could do it as a partnership, and you could not do it as a corporation.

Q. Now, handing you Petitioner's Exhibit 15;

(Testimony of Louis C. Scharpf.)

which is the partnership agreement, I will ask you to point out or designate by paragraph number and page the provision of that agreement that you regard as being the contractual relationship that permitted you—or accomplished this particular purpose that you have mentioned (hands document to witness)?

A. You might say that this is covered on page three, the last paragraph.

Q. Just identify it by paragraph and page number; that is all I asked you to do. We can go into that later.

A. The last paragraph of page three.

Q. You regard that as being the provision of the agreement that would enable you to get out of the business at any time that you saw fit, to a better advantage than if you had a corporation?

A. It is one way.

Q. It is one way. What other way?

A. As I understand it, any partner can do that any time [74] they want to, in a partnership.

Q. Did you note and read over and consider the terms of that partnership agreement when you signed it at that time? A. Sure.

Q. Is there or is there not a provision in that partnership agreement that prohibits a partner from selling his partnership unless he offers it at the same time to the other stockholders, that is, his interest in stock in the corporation? He has to do that at the same time?

(Testimony of Louis C. Scharpf.)

A. That is in the contract.

Q. How do you reconcile that with the idea that this agreement would facilitate your ability, if you desired to wash your hands of it and get out of it?

A. Well, that was the active business that they were selling; the selling of the merchandise, and that was the most important end of the business. At that time when we went into it, and at the time the highway survey went through, I figured that the corporation would be gone a long time ago.

Q. Isn't it a fact that this matter of the business of the highway survey—I assume you are referring to the Highway Commission of the State of Oregon, when you are referring to the highway survey; is that right? A. Yes.

Q. And that was nothing more than general talk or gossip, at least up to as late as 1946? [75]

A. No; I should say not. They had the survey stakes right through our property, that was true in 1940.

Q. Were there any survey stakes anywhere in the vicinity where they were still contemplating a possibility of placing a road?

A. I noticed ones where they came out catty-corners across our building, and also took a part of the Kreml warehouse on the other side of the street.

Q. Do I understand correctly from your testimony, that on January 1, 1941, so far as you were concerned, you regarded the possibility of the con-

(Testimony of Louis C. Scharpf.)

demnation or the possibility of the taking of some of the property over by the Highway Commission a danger in the very near future?

A. That is right, the way I figured it.

Mr. Davidson: I hate to interrupt, but Mr. Bryson is here and he wants to get away tonight and I would like to ask whether you plan to recess at five o'clock.

Mr. Davidson: I would like to have an opportunity to put Mr. Bryson on, so that he will be able to get back to Eugene tonight.

The Court: Is there any objection to putting him on out of order?

Mr. Pigg: I regret that it takes so long on cross-examination, but these are factual matters and it takes a long time to develop them. [76]

The Court: Have you any objection to Mr. Bryson testifying at this time?

Mr. Pigg: No.

The Court: All right. We will let the witness stand aside.

(Witness excused.)

Mr. Davidson: Mr. Bryson.

Whereupon,

E. R. BRYSON

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

(Testimony of E. R. Bryson.)

Direct Examination

By Mr. Davidson:

Q. Will you state your name?

A. E. R. Bryson, Eugene, Oregon.

Q. What is your profession?

A. Attorney at Law.

Q. Where is your office? A. Eugene.

Q. Have you represented the Twin Oaks Builders Supply Company and the Twin Oaks Company in the past? A. Yes.

Q. For how long?

A. I think I organized the first company. [77]

Q. That was before 1926?

A. Well, I couldn't say that. It was a good while ago; it was around about that time.

Q. Mr. Scharpf testified that that was the time he came in?

A. When he and Mr. Rogers first got together in their enterprise, they came to me and I formed the corporation for them. That is my recollection. Of course, I have done a great deal of law business during that time and my memory is not too good as to the exact date. I have taken care of their law business, that is, matters connected with the corporation, and that sort of thing since the formation of the company. There were a lot of things in connection with the law business, such as collection, that I did not bother with.

Q. Were you consulted on or before January 1,

(Testimony of E. R. Bryson.)

1941, with reference to their formation of a partnership?

A. I don't think that I was consulted as an attorney in the matter. When they formed that corporation, they were strangers, and they came to Eugene about the same time; they came to me and wanted me to become a director of the corporation with the idea of acting as an arbitrator between them, and in some instances during that time I acted as such. I accepted that responsibility, but I really owned no stock in the corporation. I had a qualifying share, and I have been ever since a director. Now, they came to me several times on [78] matters that they were not wholly in agreement on, on matters that were not legal, things that you would not go to an attorney with, but on business matters. Mr. Rogers especially was inclined to do that.

Sometime during the year 1940,—I can't remember just what part of the year it was, but it was in the five or six months preceding the transaction that is the subject of this hearing,—Mr. Rogers came to me as many as three or four times for extended conferences, not so much legal, although he did ask me some question about the rights and responsibilities of partners, but practically all of his talks with me were with regard to the wisdom, from a business standpoint, of complying with the urgent request of Mr. Scharpf to take either all the properties out of the corporation, or at least the operating properties, that is, the properties that they did

(Testimony of E. R. Bryson.)

take over, and form a partnership to conduct the business operations; and I hardly think that I could say that they came to me for legal advice on those questions. Mr. Rogers came to me for business advice, more I would say, whether he ought to comply with Mr. Scharpf's request.

Q. What advice did you give him?

A. Well, I talked the situation over with him at considerable length. He told me that the reason Mr. Scharpf gave to him for wanting to have a partnership was,—this was afterwards verified by Mr. Scharpf himself at a joint meeting of the [79] three of us,—that he was working there very hard producing, and had a very small interest in the corporation, only a nominal interest, and didn't like that situation; that he wanted to have an owner's interest, as a substantial owner in the operation itself, and he figured he couldn't do that except by a partnership; and that was given as his reason.

Mr. Rogers expressed to me the fear that Mr. Scharpf was trying to get into a position legally where he might get his sons into the business,—expressing it in a rough sort of way,—to get Mr. Rogers out of the business. He talked about his age, and so forth and the fact that Mr. Scharpf had a couple of sons that were coming on, that were very fine young men, and Mr. Rogers was just afraid that, if he consented it might put Mr. Scharpf in a position where he could supplant him, you might

(Testimony of E. R. Bryson.)

say, in the business; not steal it from him, but on some fair terms for his sons. We talked that over at considerable length several times. I had the highest admiration for both of them. I told him that I didn't think Mr. Scharpf would ask anything of that sort from him that was not fair. I told him, on the other hand, that Scharpf had sons growing up, and if they wanted to get into the business, I didn't see how he could arbitrarily refuse to let him carry out the ambition,—on proper terms, of course. And eventually, at my suggestion, there was a joint meeting of the three of us. It was not a director's meeting, it was just consultation regarding the situation that [80] they were in, and Mr. Scharpf's urgent request that he consent to what Mr. Scharpf was wanting. At that time we talked rather frankly about his reasons for desiring this change in the organization. Again Mr. Scharpf stated that there he was working like a dog, and very effectively, and that the two of *the* together were making profits, and that all he was was a hired man of the corporation, and he didn't like to be in that position, and therefore he desired the formation of a partnership in which each of them, or in which he would have a fourth interest, with his wife having the other fourth, so that he would share in the profits as the business was built up, and he would have a share of the earnings and accumulations. I put the question to him about his sons, and he admitted that there was nothing that he would like better than

(Testimony of E. R. Bryson.)

to have his sons, or at least one of them eventually go into the business, but he expressed himself as not willing to force anything of that kind on Mr. Rogers, if Mr. Rogers did not feel it was fair. He called my attention to Mr. Rogers' fine sons.

Now, these men had the utmost confidence in each other; they got along fine in their business relations, and they have been successful, and they complimented each other in their business relations; and he said that if Mr. Rogers wanted his sons in the business, he certainly would consent to it without any difficulty.

I had told Mr. Rogers that he must not count on me [81] as an arbiter in such a dispute, or that he could expect me to decide with him arbitrarily. I told him that I thought he had a right, under proper terms and proper considerations, that is, Mr. Scharpf, to get his sons in there; and Mr. Rogers realized that. I also told him,—this was in connection with the discussion,—of the legal effect of the partnership as compared with a corporation, and that is he and Scharpf ever had an outright stalemate, I was not going to arbitrarily going to force any decision on either one of them, that I would simply resign; and that there simply would be a stalemate, and, if there was a partnership, as I viewed the law, that could eventually result in a receivership, and that it was hardly within his power, by any form of business organization, to compel Scharpf to stay in the business and operate

(Testimony of E. R. Bryson.)

it with him for the rest of Mr. Scharpf's life, or for the rest of his life.

Q. Did you advise him, except for Mr. Scharpf's insistence, that you would prefer the corporation?

A. Yes, I rather think I did. I had some hesitation; however, I eventually advised Mr. Rogers to consent to it, but I had some hesitation in doing it.

Q. Did you consider any tax angle of the matter?

A. No, it was never discussed. I am not a tax attorney; they never came to me with any of their tax problems. The problem that Mr. Rogers was very concerned about, and which was of the greater importance in his mind, and which was also [82] Mr. Scharpf's problem, was not so much the tax angle as it was the questions that were uppermost in the minds of either of them; on the part of Mr. Rogers, the question of his sons and also the question of certain liabilities in partnerships as compared with corporations, while Mr. Scharpf wanted to get into a partnership so that he would be an equal partner in the business.

Q. It is your memory that these discussions with Mr. Rogers, relating to Mr. Scharpf's association commenced five or six months before the consummation of the partnership?

A. It commenced a quite a while before; I couldn't say how long before, but I have an idea it was at least that long. I think that there were about four times that Mr. Rogers called me and said

(Testimony of E. R. Bryson.)

he wanted a conference with me. I think there were as many as four times before the one in which Mr. Scharpf participated.

Q. Did you discuss in this meeting the complete dissolution of the corporation?

A. I think there was some question as to whether the corporation should be dissolved and the property turned over to the stockholders, and the partnership formed amongst the individuals, or whether the corporation should merely turn over what you might call the operating property. That is my memory. It was probably at my suggestion that it was not necessary to dissolve the corporation, in order to put [83] the operating property into the partnership, that is, that the real property could be left with the corporation and the operating properties turned over to the partnership.

Q. Did Mr. Rogers insist that the corporation be not dissolved?

A. I won't say that. I will say that he hung back and was very hesitant and resistant to the idea in his own mind, afraid of it. I know that he telephoned to his brother about it.

Q. Who is his brother?

A. He has a brother in the east, in Minneapolis.

Q. Did you draw the partnership agreement for the Twin Oaks Builders Supply Company?

A. I did.

Q. We have in evidence now, Mr. Bryson, as Petitioner's Exhibit 15, a document that has been

(Testimony of E. R. Bryson.)

stipulated to as a copy of the partnership agreement (hands document to witness). Will you look at that briefly and say whether that is the agreement that you drew?

A. I couldn't say except by comparing it with the original, but I am satisfied from testimony that that is what it is.

Q. In that agreement, Mr. Bryson, there are certain provisions in relation to the duties of a withdrawing partner to make a buy or sell offer, and to include in that offer stock in the corporation, and also an option to purchase an [84] interest by a husband of his wife's interest in the partnership, in the event of her death, and an option, in the event of the husband's death that the other male partner, with his wife, may purchase it.

Q. Do you remember those provisions?

A. In a general way, I have not read it over since I wrote it. This was in 1941. I don't remember the details, but I remember there was such a provision in the contract.

Q. Will you tell us why those provisions were put in there?

A. The general provision for allowing the buy and sell offers for that sort of thing? Is that what you mean?

Q. Yes.

A. Well, there was quite,—that is quite a customary provision in a partnership agreement of that character, where there are certain properties in-

(Testimony of E. R. Bryson.)

volved and considerable operations. If you refer to the execution of the,—if you refer to the inclusion of the stock of the corporation, it seems to me only an ordinary business and proper business arrangement, for either partner to be able to take advantage of the opportunities offered by the contract and to purchase the property of the partnership, and at the same time, in a situation of this kind, to give him the opportunity to also purchase the stock of the corporation and not leave the corporation with some extensive properties without even an *opportunity* rent it [85] advantageously.

Q. Do you remember, Mr. Bryson, if you had previously drawn any agreement between Mr. Rogers and Mr. and Mrs. Scharpf relating to the stock of the corporation?

A. Yes, I had. That is an agreement, as I recall, providing for the purchase of the stock by the survivors in the event of death.

Mr. Davidson: I would like to have this document marked for identification.

(The document referred to was marked as Petitioner's Exhibit No. 29 for identification.)

Q. (By Mr. Davidson): I hand you herewith an agreement date May 31, 1938, marked for identification as Petitioner's 29, and ask you if that is the stock option agreement to which you referred? (Hands document to witness.)

A. Yes, it is.

Q. Did you draw that?

A. Yes, I did.

(Testimony of E. R. Bryson.)

Mr. Davidson: I would like to offer that in evidence.

Mr. Pigg: No objection.

The Court: It will be admitted and marked as Petitioner's 29.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 29 for identification, was received in evidence as Petitioner's Exhibit No. 29.) [86]

Q. (By Mr. Davidson): Is it correct, Mr. Bryson, in general, that the provisions relating to the options of the stock in a partnership interest, under the partnership agreement of January 2, 1941,—that those provisions were substantially the same as those included in the stock option agreement of 1938?

A. Of course, they will speak for themselves; it is my general recollection that they were substantially the same, and designed to carry out the same plan and design.

Q. You stated that your conferences prior to this general meeting when you came to this agreement, were with Mr. Rogers rather than Mr. Scharpf?

A. Yes, I had three or four conferences, or more, with Mr. Rogers, and they related to his objections to the partnership, the change in the arrangement, and finally I suggested to him that he ought to call Mr. Scharpf in and talk frankly about his objections. This we did, and we talked it over with Mr.

(Testimony of E. R. Bryson.)

Scharpf and Mr. Rogers then announced that generally he was not in favor of it, but that he would consent to it. I think it was that same night, or it might have been later. Then, of course, we discussed and agreed upon the terms of the partnership agreement; after that had been agreed upon, I put in some provisions as a protection to Mr. Rogers, to protect him against what he was afraid of.

Q. Did Mr. Rogers object to the formation of a partnership [87] as distinguished from a corporation?

A. Yes, he objected to it. He did not say arbitrarily that he wouldn't do it, but his arguments were against it, that he was afraid of it, and that he was very much opposed to the idea of any change.

Mr. Davidson: That is all, Mr. Bryson.

Cross-Examination

By Mr. Pigg:

Q. Mr. Bryson, as I understand your testimony, these conferences that you had with Mr. Bryson were of a non-confidential nature, so far as any conversations or advice that you gave Mr. Rogers or Mr. Scharpf?

A. I don't understand your question.

Q. They were non-confidential? There were no privileged communications?

A. No, I don't think so. They were not talking to me as a lawyer; they were talking to me as a man whom they had agreed to resolve their differ-

(Testimony of E. R. Bryson.)

ences, and how they could best solve them in a business way.

Q. Now, at the time of your first conversation, and the other conversations that you mentioned with Mr. Rogers, did you know anything about the number of shares in the stock of the company that Mr. Rogers held?

A. I couldn't tell you the number of shares, but I know Mr. Rogers held half of the stock and Mr. and Mrs. Scharpf [88] owned the rest of it. Mr. Scharpf owned only a nominal amount; I don't know the proportion. I probably did right when I drew the papers, but I had probably forgotten it a week after that.

Q. At the time you drew the papers, you knew Mr. Scharpf was secretary-treasurer of the corporation?

A. Yes.

Q. And was responsible for various phases in the conduct of its business, as he described them this afternoon?

A. He was responsible for performing the duties of secretary-treasurer of the corporation: is that what you mean?

Q. Were you present when he testified this afternoon?

A. Yes, but I couldn't hear his testimony very well. I sat over in the corner, in the open, where I couldn't hear very well.

Q. You heard his testimony as to the general

(Testimony of E. R. Bryson.)

scope of the affairs of the business, or the conduct of the business, and its background?

A. I didn't hear all of it; I think I could probably sense it.

Q. You knew the circumstances, in general, when he had the conversation that you referred to?

A. Well now, I knew this about it, that Mr. Rogers was an older man with a very large experience in large affairs, and a man who was apt to be a good deal better informed about [89] general economic conditions and better qualified to chart the financial and business course of the corporation that was Mr. Scharpf. On the other hand, Mr. Scharpf was extremely well liked in the community, very active and very energetic, a natural salesman, and they just complimented each other's work in that respect.

Q. As the holder of the qualifying shares of the corporation, you attended the stockholders meetings?

A. Yes; not all of them, perhaps, but whenever anything of any consequence was up, I attended.

Q. Where were the meeting held?

A. They were usually held in my office, I think.

Q. Did you know of any occasion at any time when Mrs. Scharpf voted her stock other than in accordance with Mr. Scharpf's wishes?

A. No, I don't remember of any such situation. If there was any dissension between them, I never heard of it.

(Testimony of E. R. Bryson.)

Q. So far as the possibility of Mr. Scharpf's stock being brought into the business, in the event of the formation of the partnership, did you discuss,—I mean the effect of such an arrangement,—did you discuss at all the effect of such an arrangement with Mr. Rogers, and the possibilities, or the possible equivalent of Mr. Rogers giving or transferring to the name of one of his sons a relative portion of his stock?

A. You mean of Mrs. Scharpf doing that? [90]

Q. Well, I may be confused. I'm sorry.

A. If I understand what you mean, I don't think so. I will tell you, while I pointed the ultimate end of actual strife and lawsuits, I never for a moment thought there would be any trouble between the two men; they were both such fine men that they would come to an agreement, and I think that I said, in my judgment, if I said something was fair, they would do it; I think that Mr. Rogers did consent to some things that he was at first very much opposed to, and he did so in my advice.

Q. You knew, as an attorney, that Mrs. Scharpf could have transferred or given to the same sons a percentage or a number of shares of stock in the corporation, and the sons could have had a voice in the corporation's business to the same extent that they might have in the partnership arrangement, didn't you? A. I don't think that is true.

Q. You don't think that is true?

A. No, I do not. She could transfer stock to

(Testimony of E. R. Bryson.)

one or both of her sons, and they could participate in meetings as all stockholders do, in general, in the corporation, but that didn't mean they would get into the business; that didn't mean that they would be taken into the business as employees or officers.

Q. Isn't it a fact that Mr. Rogers held fifty per cent of the stock in person, and Mr. and Mrs. Scharpf held fifty [91] per cent between them, with neither family in control of the corporation,—actual control.

A. Oh, there was a possible stalemate.

Q. There was a possible stalemate?

A. That is right.

Q. So that Mrs. Scharpf or Mr. Scharpf, so far as his full number of shares was concerned, could have given their shares of stock to the sons, or anyone else who they might see fit to give them to, couldn't they? A. Sure.

Q. And Mr. Rogers would have had nothing to say about it?

A. Not so far as the stock ownership was concerned.

Q. The corporation would have continued to exist right along unless and until the conditions got bad that it might result in a receivership under those circumstances?

A. That is a possibility.

Q. That is the picture so far as the corporation was concerned. Now, so far as the partnership was concerned, you knew, also, that it was impossible

(Testimony of E. R. Bryson.)

for Mr. Scharpf or Mrs. Scharpf, as partners, to bring in the son without the son the other partners don't you?

A. I don't know as I understand you.

Q. Well, it could not have been done by either one or the other attempting to bring in their sons without the consent [92] of the other partners?

A. That's right.

Q. And if they had attempted it, why that would, per se, dissolve the partnership?

A. Or, give a right of dissolution to the other partner.

Q. So, what did you think about Mr. Rogers' apprehensiveness so far as the sons were concerned, as to whether it was imaginary or whether it was fanciful?

A. Well, I thought it was quite possible that Mr. Scharpf a few years later, when his son got through with his education, that he might want him in the business. I told Mr. Rogers that, and that if he wanted him in he should take him in,—under the proper kind of arrangements, of course, not as manager or as a full partner. but in a position in the business as an employee, so that he could go into the business and eventually be able to come into it, perhaps.

Q. What reason was there, if you know why that same arrangement could not have been accomplished so far as the stock ownership of the corporation was concerned?

(Testimony of E. R. Bryson.)

A. I don't think you get this distinction. Mr. Rogers had the idea he would be in a better position against having that situation forced upon him under a corporation than he would under a partnership.

Q. You did not, as an attorney, attempt to explain or discuss these phases as to the legal aspects with Mr. Rogers? [93]

A. Oh, yes, I did, to some extent.

Q. Didn't you tell him the same things in which he expressed concern could happen in a corporation as well as in a partnership if not better?

A. I don't know if I understand your meaning.

Q. We will strike the question. Did you know, or did you discuss with Mr. Rogers the possibility that he anticipated, of the bringing of the sons into the business as possible partners, that, so far as the future of it was concerned, Mr. Scharpf could have, and his wife could have accomplished the same thing in the corporation?

A. That was a long time ago. I know I discussed the legal implications and the legal situation with Mr. Rogers; I would not be prepared to know and say what all the possibilities were that I discussed with him at that time, unless I would sit down for an hour and think of some of the things. But I think, in a general way, the Scharpfs could have brought about that situation, but from a practical situation, he could not have forced his son in there. However, I told Mr. Rogers that, if he wanted him to come in as an employee, under proper regulations, either

(Testimony of E. R. Bryson.)

if the corporation was continued, or under a partnership, he should allow him to come in. I told Mr. Rogers that I didn't think there was any possibility of Mr. Scharpf trying to force his sons in against his protest, if he insisted upon it; but I also told Mr. Rogers at the [94 & 95] same time that, if Mr. Scharpf wanted his sons in there and wanted them to grow up in the business, as employees, of course, and not as managers, that I thought Mr. Rogers should consent to it; and, on the other hand, I thought that if Mr. Rogers wanted any of his sons in there, Mr. Scharpf should consent to it. As it was, the situation worked out beautifully, but it was a real worry to Mr. Rogers at the time.

Q. But none the less, from Mr. Scharpf's standpoint, and that of his family, he would be in a better position to bring his sons into the business of the corporation than he was after the business was transferred to the partnership?

A. No; I think he was in a better position to bring his sons in after they were a partnership, than he was when they were a corporation.

Q. He would have had to have Mr. Rogers consent in that event, wouldn't he?

A. Well, the only way either one of them could bring his sons in against the protest of the other would be a threat of breaking the arrangement between them, and the partnership could be more easily broken up than the corporation.

Q. Now, as concerns Mr. Rogers, the hazards or

(Testimony of E. R. Bryson.)

the dangers that he might have anticipated in the event of bringing his sons into the business,—the partnership,—the partnership did not improve that situation, did it?

A. Mr. Rogers' situation? [96]

Q. Yes.

A. No, I don't think it did in that respect. But I convinced him I thought there was no danger, because his apprehensions, I thought, were unjustified. I think I convinced him that he could not afford to make an issue of this partnership request at this time, over something which might never become anything of any consequence, and, if it did come, it could be handled. I told him that I thought he could not afford to reject the urgent request of his partner, in wanting to have a share of the operating end of the business, because of the fear that his partner might at some time in the future try to force his sons into the business.

Q. Mr. Bryson, as already shown, we know that Mr. Rogers held fifty per cent of the total outstanding stock. That is correct, isn't it?

A. Mr. Rogers held fifty per cent of the stock.

Q. Assuming that Mr. Scharpf held 3.84 per cent and Mrs. Scharpf held 46.16 per cent, and the other 50 per cent was held by Mr. Rogers; what was there to prevent a shifting of the stock interest as between Mrs. Scharpf to Mr. Scharpf, on a 50-50 basis, that is, as to them, each getting 25 per cent of it;

(Testimony of E. R. Bryson.)

what could prevent that being brought into effect?

A. There was nothing to prevent it.

Q. That is what the result of the partnership agreement is, giving Mr. Scharpf 25 per cent of the partnership? [97]

A. That is right.

Q. Why couldn't that shifting of stock have been accomplished?

A. Well, judging from the number of gray hairs in your head, I think you have practiced law long enough to know that, in these inter-family relationships, while it is true Mrs. Scharpf could have given Mr. Scharpf one-half of her stock and accomplished it, still things are not done that way. You do not generally find wives willing, usually, to turn over one-half of their assets to their husbands.

Q. Didn't she consent to the arrangement,—the partnership arrangement?

A. Yes, she consented; but her husband got none of her stock; as a result of the partnership agreement, he got one-fourth interest in the operating company.

Q. But after the partnership arrangement, her stock ownership in the corporation didn't represent an interest in a going concern? Did it?

A. No, it did not.

Q. It was worth only the liquidation value of the real estate?

A. Yes, coupled with the joint ownership or operation of the properties under an operating agreement by the stockholders.

(Testimony of E. R. Bryson.)

Q. What is the fact as to the discussion, if any, as to [98] the scheme under which the partnership would be organized?

A. I cannot remember details like that. That is quite a long distance back, but I would say that it must have been because of the fact that they had been operating that business. They asked me to change the corporate name, and the only way that could possibly be done was the way it was done. I would say that the reason they wanted to retain the old name in the going concern, or in the operating concern, was to conserve the good will that had been built up by the use of that corporate name. I don't remember the details of those requests.

Mr. Pigg: That's all.

The Court: Are there any further questions?

Redirect Examination

By Mr. Davidson:

Q. In the case of a transfer by Mr. Scharpf of a part of his stock to one of his sons, in the corporation, there is nothing that the sons could do to force his recognition, is that right?

A. In the stock of the corporation?

Q. Yes.

A. He could force him to recognize him as a stockholder.

Q. As an employee?

A. Not as an employee, or to take him into the business.

Q. But after the partnership was formed, if Mr.

(Testimony of E. R. Bryson.)

Scharpf [99] had assigned one half of his interest in the partnership to his sons, he would have to accept it, that is, Mr. Rogers would have to accept it, or they would dissolve the partnership?

A. Yes, it could be dissolved.

Mr. Davidson: That is all.

Mr. Pigg: That is all.

The Court: You may stand aside.

Mr. Davidson: This witness will not be desired by the government, will he?

The Court: Is the witness excused?

Mr. Pigg: So far as the government is concerned.

Mr. Davidson: Then you may be excused, Mr. Bryson.

(Witness excused.)

The Court: Is it agreeable that we meet tomorrow morning at 9:30?

Mr. Davidson: That is agreeable.

Mr. Pigg: That is agreeable.

The Court: We will take a recess until 9:30 tomorrow morning.

(Whereupon, at 5:30 p.m., a recess was taken until 9:30 a.m., Tuesday, June 8, 1948.) [100]

9:30 A.M., June 8, 1948

(Met pursuant to adjournment.)

The Court: Are counsel ready to proceed?

Mr. Davidson: Ready, your Honor.

Mr. Pigg: Ready, your Honor.

Mr. Davidson: I will call Mr. Scharpf, who was

on the stand yesterday, for further cross-examination.

The Court: Has cross-examination been concluded of this witness?

Mr. Pigg: It has not, your Honor.

Whereupon,

LOUIS C. SCHARPF

recalled as a witness for and on behalf of the Petitioner, having been previously duly sworn, was further examined and testified as follows:

Further Cross-Examination

By Mr. Pigg:

Q. Mr. Scharpf, I believe when we adjourned, in your cross-examination yesterday afternoon when I was interrupted, among the last things that we were discussing was the connection, if any that Mr. Collins, the accountant, had with the corporation. In these meetings and discussions that were had preliminary to the action taken by the corporation, as reflected by the corporate minutes,—I mean the minutes of the stockholders meeting and the directors meetings that are now in evidence, on the first of January, 1941, did Mr. Collins [102] take any part, or was he present at any of the discussions between you and Mr. Rogers and others that led to the formation of the partnership?

A. I think most of these discussions were with Mr. Bryson, our attorney, and I think we eventually called in the auditor to help out so far as the books were concerned.

(Testimony of Louis C. Scharpf.)

Mr. Pigg: I want the record to show that any reference to Mr. Collins, who has been the representative of the Petitioner, is not made in a personal way. There is nothing personal about it, but merely his association on the question of the tax angle.

Q. (By Mr. Pigg): You say most of the discussions were with the attorney, Mr. Bryson?

A. That is right.

Q. You mean by that, that Mr. Collins was not present, and that you did not discuss the tax angle with him at all?

A. I did not discuss the tax angle about the formation of the partnership.

Q. Did he give you any advice about the tax angle in the formation of the partnership?

A. I don't remember it.

Q. What did you say?

A. I don't remember it; no sir.

Q. Would you say that he did not? [103]

A. I would say that he did not.

Q. Mr. Collins, is he the gentleman at the counsel's table, the third man from the right at the table there (indicating)?

A. Yes.

Q. And do you know whether Mr. Collins prepared the petition of the Petitioner corporation that was filed with the tax court in this proceeding?

A. Yes, I imagine he did.

Q. If his name appears on the petition, would you say that was the same person? Would you?

A. Yes.

(Testimony of Louis C. Scharpf.)

Q. When, Mr. Scharpf, did you first become unhappy or concerned about your status as a stockholder and your interest as represented by your stock in the Petitioner corporation?

A. Well, for quite a number of year; I didn't bring it up to Mr. Rogers until probably a year or two before that time.

Q. Have the services to the corporation, as you described them yesterday, by both Mr. Rogers and yourself, prior to 1941,—

The Court: I believe, counsel, you went over that pretty thoroughly yesterday. Let us not go over it again. That is the trouble about bringing witnesses back on the stand after they have been on the stand.

Mr. Pigg: That is correct, your Honor; but I am going to go into another point.

The Court: I remember that testimony yesterday.

Mr. Pigg: There is just one question on that.

Q. (By Mr. Pigg): Did you receive, each of you, a salary from the corporation of \$7,200 in 1940 for your services? A. I think that is right.

Q. If that is the amount shown on the corporation's returns, would you say that would be the correct figure?

A. Yes, it should be on the books, yes.

Q. I don't remember whether you testified as to where all the property, the real property and fixtures of the corporation were located on January 1, 1941; whether they were at Eugene, Junction City,

(Testimony of Louis C. Scharpf.)

or Cottage Grove, or all three places. Were they at all three places? A. That is right.

Q. Are both Mr. Rogers and yourself still officers of the Petitioner corporation and in the same capacity that you were before?

A. Yes; Mr. Rogers is President and I am Secretary-Treasurer.

Q. Mr. Scharpf, I hand you Petitioner's Exhibit 7 and I call your attention to the item of \$729.40 appearing under your name on that exhibit, as a part of the \$2,000. Do you [105] see that (indicating)? A. Yes.

Q. That is described as borrowed from George L. Scharpf. Does that represent a note or open account, if you know?

A. Well, I don't know. I imagine it was note. We generally borrowed money with notes from the boys.

Q. Do you know whether that \$729.40 had been borrowed from, I believe you said it was your son?

A. Yes.

Q. Was it borrowed before January 1, 1941?

A. I couldn't say that; it was evidently right at that time.

Q. I hand you Exhibit No. 9, which is the minutes of the special meeting of the board of directors of the Petitioner corporation, held on January 2, 1941. I call your attention to the last paragraph which describes the transaction insofar as the indebtedness of the corporation to the individuals

(Testimony of Louis C. Scharpf.)

named are concerned. Can you say whether that is the actual situation, and if that is not different from your testimony yesterday?

A. Can I read this paragraph (indicating)?

Q. Surely. May I say, Mr. Scharpf, I am not trying to trip you in your testimony, or get you to contradict your testimony; I am just trying to refresh your memory.

A. I am trying to understand that (indicating document). [106]

Q. Well, that is going to take some time. I will withdraw the question. I will ask you, Mr. Scharpf, if this Exhibit 9, beginning on page 1 and ending on page 2 of the exhibit, does that not state that the indebtedness by the corporation to Mr. Rogers in the amount of \$2,000 and the indebtedness on the part of the corporation of \$1,500 to Mrs. Rogers, and the indebtedness of the corporation to yourself, Mr. Louis C. Scharpf, \$2,000, and the indebtedness to Eva M. Scharpf, \$2,000,—that the amounts were cancelled? A. Yes.

Q. That is correct?

A. That evidently explains the situation, that the corporation owed John Rogers and myself some salary, and I think it owed some dividends, and that they had a note George and Bill that would tie into this,—I think that would explain it.

Q. Now, referring to the item, Exhibit 9, appearing under your name "Louis C. Scharpf," and to the item of \$729.40. Wouldn't the two exhibits to-

(Testimony of Louis C. Scharpf.)

gether, Exhibits 7 and 9, show that the \$729.40, as it appears in Exhibit 7, refers to the sum borrowed by the corporation, or by you from your son and loaned to the corporation prior to January 1, 1941?

A. Yes, I think prior to January 1, 1941, it owed George L. Scharpf some money.

Q. And that was a part of the indebtedness that was [107] cancelled in this transaction?

A. Yes.

Q. Would the same thing be true with respect to Eva M. Scharpf, in the sum of \$1,126.60?

A. Yes.

Q. Now, this \$729.40, has that been repaid to your son? A. Yes.

Q. And what was the source of the funds from which the repayment was made?

A. Well, the only source I have is the salary and earnings from the partnership.

Q. Referring to the \$1,126.60 item, first, Eva M. Scharpf, (indicating), do you see that?

A. Yes.

Q. What would have been the source of repayment of that item.

A. Well, the source of repayment for that item could have been some of the earnings of the Twin Oaks Builders Supply Company, or some of the earnings from some of her private investments.

Q. Mr. Scharpf, I hand you Petitioner's Exhibit No. 1, which contains the balance sheets of the Twin Oaks corporation from 1935 to 1944, inclusive. I

(Testimony of Louis C. Scharpf.)

call your attention to the column near the center, which is headed "sale to the partnership, January 1, 1941," and to this item of \$7,500 in that column, enclosed in parenthesis, and opposite the words "notes [108] payable," and under "liabilities and capital," and I call your attention also to the fact that the exhibits which I am now handing you,—that the four items at the bottom of that page aggregate \$7,500. It is a fact that this item of \$7,500 on Exhibit No. 1 refers to the same four items on Exhibit 9?

A. I wouldn't know; it is the same amount. I wouldn't know whether it refers to the same amount or to the same transaction or not.

Exhibit 9 represents or refers to the indebtedness of the corporation, does it not, which are cancelled?

A. Yes.

Q. Exhibit No. 1, or "notes payable," refers to the indebtedness owing by the corporation, does it not?

A. That is what it says, "notes payable \$7,500."

Q. It is reasonable to assume they refer to the same item?

A. No, I wouldn't assume anything; I would want to look it up in the books.

Q. Can you determine whether that is a fact or not?

A. I expect so; we have a very good set of books.

(Testimony of Louis C. Scharpf.)

Q. I may have to get at that some other way. Mr. Scharpf, I hand you Petitioner's Exhibit 10, which is the notes receivable, as it appears on the books of the Twin Oaks Company, and represents notes receivable from the Twin Oaks Builders Supply Company; is that correct? A. Yes.

Q. I call your attention to the figure or item of \$89,378.35 appearing on the second column under the words or heading "principal," and under the subheading "indebtedness," also to the right hand column "balance." The same figure appears there, does it not (indicating)? A. Yes.

Q. Handing you Exhibit 11, which is the note signed by Twin Oaks Builders Supply Company dated January 2, 1941, in the sum of \$89,378.35. Those two refer to the same transaction, do they not? A. Yes.

Q. And Exhibit No. 11 was the note given by the partnership in payment, or as a promise to pay the principal amount of \$89,000; is that correct?

A. That is right.

Q. What was the source of the funds with which that note was paid on the date and in the amount shown in Exhibit 10,—that note and its renewal?

A. Well, the source from which that would be paid would be from the earnings of the partnership; sale of some of their assets.

Q. What other assets did the partnership have other than those transferred to it by the corporation?

(Testimony of Louis C. Scharpf.)

A. The assets were the merchandise and the trucks and the bank account, and the book accounts.

Q. The accounts receivable and the cash?

A. Yes.

Q. Being the same assets that were transferred on January 1941 by the corporation; is that correct?

A. That is right.

Q. Mr. Scharpf, I hand you Petitioner's Exhibit 14, which is the schedule, as per the books of the Twin Oaks Builders Supply Company, of rentals received by the Twin Oaks Company, the corporation, from the Twin Oaks Builders Supply Company, the partnership, for the years 1941 to 1948, or, rather, to February 28, 1948, inclusive; is that right?

A. Yes.

Q. Didn't the Twin Oaks Company, that is, the corporation, acquire or purchase property known as the McCormack property in 1941 or during the year 1941?

A. We acquired the McCormack property about that time.

Q. You did? A. Yes.

Mr. Pigg: I will ask that this be marked for identification.

The Clerk: It will be Respondent's B.

(The document referred to was marked as Respondent's Exhibit B for identification.)

Q. (By Mr. Pigg): I hand you Respondent's Exhibit B for identification [111] and ask you if

(Testimony of Louis C. Scharpf.)

that refers to the McCormack property (hands documents to witness)?

A. That is right.

Q. Does that contain any factual information or statements concerning the date?

A. That was purchased in July 1941.

Q. By the Petitioner Corporation?

A. That is right.

Q. From Martha McCormack?

A. That is right.

Q. What was the purchase price of that property?

A. What was the purchase price?

Q. Yes?

A. I don't remember what it was; I would have to look on the books.

Q. Does it not bear, the photostatic copy, in print, and indication that the revenue stamps amount to \$4.40?

A. That is right.

Q. Wouldn't that indicate that the purchase price was between \$3500 and \$4000?

A. I couldn't tell you that.

Q. You don't know? A. No.

Q. Who would know the purchase price?

A. We could look it up in the books; we have the purchase [112] right on the books there.

Mr. Pigg: Your Honor, I understand that counsel for the Petitioner will concede or stipulate that this exhibit does show the purchase price to be between \$3500 and \$4000.

Mr. Davidson: We so stipulate.

(Testimony of Louis C. Scharpf.)

The Court: Very well.

Q. (By Mr. Pigg): Mr. Scharpf, what is the fact as to whether or not this McCormack property was used thereafter in the business of the partnership?

A. The facts were these; the property had a big two-story house on it that we had to tear down, and we tore it down, and there is still a vacant lot there which we use for storage.

Q. For storage of lumber and building materials?

A. That is right; for drivers and storage space; no buildings on it. We wrecked the building.

Q. The storage space is a necessary facility of a lumber business such as yours is it not?

A. That is right.

Q. Did not the Petitioner corporation also buy what is known as the Orem property about December 1943?

A. The Orem property?

Q. Yes? A. Yes. [113]

Mr. Pigg: I will ask that this document be marked for identification as Respondent's next in order.

The Clerk: Respondent's Exhibit C.

(The document referred to was marked as Respondent's Exhibit C for identification.)

Q. (By Mr. Pigg): Mr. Scharpf, I hand you Respondent's C for identification, and I will ask you if that document purports to bear a date,—strike that. I will ask you if that document purports

(Testimony of Louis C. Scharpf.)

to be a deed, and if *it related* to the Orem property?

(Hands document to witness.)

A. That is right.

Q. And if it shows the purchase or acquisition by the Petitioner of this property?

A. That is correct.

Q. Can you tell me the amount of the revenue stamps that are shown on there?

A. There is \$4.15 there (indicating). How much is that? (Indicating.) It is about four dollars and something.

Q. Do you know the purchase price that was paid for the Orem property?

A. No, I don't without referring to the books.

Q. Do you know whether the revenue stamps as they appear on Exhibit C for identification would show a purchase price of from \$4500 to \$5000? [114]

A. No; I wouldn't know how that figures out.

Mr. Pigg: Will counsel stipulate that the purchased price of the Orem property was \$2500?

Mr. Davidson: That is stipulated.

Q. (By Mr. Pigg): What type or character of property is the Orem property, Mr. Scharpf?

A. It is a residence.

Q. It has been a residential property, and it was a residential property at the time it was acquired, and has remained such until the present time?

A. Yes.

Q. Is it rented or occupied by tenants?

(Testimony of Louis C. Scharpf.)

The Court: What is the date when the consideration of that \$2500 was given?

Mr. Pigg: December 1, 1943, Your Honor.

The Court: 1943?

Mr. Pigg: Yes, Your Honor.

Q. (By Mr. Pigg): Do you know the amount of the annual or monthly rental paid by the tenants of that property, Mr. Scharpf?

A. Well, recently it has been, I think, \$66 a month or something like that.

Q. Is that more or less than it was immediately after December 1, 1943? [115]

A. Well, I would not know without referring to the records; I could not say.

Q. Do you know whether the rental has been increased by the corporation; whether the rental charges by the corporation have been increased since the acquisition?

A. No, I don't. That was really Mr. Rogers' share of the work, and I am not too familiar with it.

Q. To whom does the tenant of that property make payment of the rental?

A. To the Twin Oaks Builders Supply Company, you mean?

Q. Yes. A. That is right.

Q. The partnership? A. That is right.

Q. Mr. Scharpf, I hand you Petitioner's Exhibit 20, which is a report of the Eugene, Oregon building permits for the past 33 years, beginning in 1914 (hands document to witness).

A. That is right.

(Testimony of Louis C. Scharpf.)

Q. Where and in what localities, cities or towns, does the Twin Oaks Builders Supply Company have its customers or have its trading area?

A. Well, we have a store in Junction City.

Q. Do you have a store in Cottage Grove?

A. Not now. [116]

Q. You did? A. Years ago, yes.

Q. You did in 1941? A. No.

Q. What did you have in Cottage Grove?

A. Well, we had a warehouse site down there.

Q. How far is that from Eugene?

A. About 22 miles.

Q. How far is it from Junction City.

A. That would be 14 miles further. It would be 36 miles from Junction City.

Q. Now, what constitutes the trade area of the Twin Oaks Builders Supply Company?

A. Well, It is all the trading area adjacent to Eugene and Junction City.

Q. The customers of the Twin Oaks Builders Supply Company are not confined only to Eugene, Junction City and Cottage Grover, are they?

A. No; we have some farm trade; some farmers trade with us.

Q. Prior to January 1, 1941, what services, if any were rendered by Mrs. Scharpf to the corporation?

A. No services; she was simple a stockholder.

Q. Prior to the same date, what services, if

(Testimony of Louis C. Scharpf.)

any, were rendered by Mrs. Rogers to the corporation? [117]

A. No services at all.

Q. Subsequent to January 1, 1941, what services, if any, have been rendered by Mrs. Scharpf to the partnership?

A. Well, she often signs the payroll checks, and the checks in payment of notes payable, and other checks, and lists the accounts receivable once a month, and advises us about things.

Q. Who prepares these payroll checks?

A. You mean to the point they are ready for signature?

Q. Yes. A. The Bookkeepers.

Q. Does Mrs. Scharpf supervise or instruct the bookkeepers how to prepare these payrolls and payroll checks? A. No sir.

Q. Subsequent to January 1, 1941, what services, if any, have been rendered by Mr. Rogers to the partnership?

A. Just about the same type of work.

Q. The same type as Mrs. Scharpf?

A. That is right.

Q. Doesn't she sign payroll checks and payrolls and so forth.

A. Yes; and lists the accounts receivable.

Q. What are the circumstances which determine whether or not Mrs. Rogers or Mrs. Scharpf will sign payroll checks?

A. There is no determination; whoever is handy.

(Testimony of Louis C. Scharpf.)

They usually have to do it in the nights; the girls sign them in the evening.

Q. Whoever happens to be available?

A. That is right.

Q. Are they signed at the home or office?

A. In both places. The listing of the accounts, of course, has to be done at the office.

Q. Are the payroll checks ever signed by either Mr. Rogers or yourself? A. Yes.

Q. How many employees are there on the payroll?

A. How many employees are there on the payroll?

Q. Yes. A. About 30.

Q. How often are they paid?

A. Every two weeks.

Q. So there would be approximately sixty payroll checks to sign a month?

A. That is right.

Q. Mr. Scharpf, going back to the McCormack property, I believe you said that was one on which a building was located at the time of its acquisition and it was removed and wrecked?

A. That is right.

Q. You said the Twin Oaks Builders Supply Company [119] wrecked the building, or caused it to be wrecked?

A. We hired somebody to wreck it.

Q. Who do you mean by "we"? The partnership?

(Testimony of Louis C. Scharpf.)

A. Well, I don't know; I don't know who that was.

Q. Is it a fact or is it not a fact that the partnership did hire the wrecking of the building and paid for the wrecking of the building and putting the property in a condition of usefulness for the storage of lumber and other materials for your business? That is a fact, isn't it? A. I think so.

Q. Do you have any reason whatever to doubt that that is a fact?

A. Well, that is a matter that you would have to look up on the books in order to be absolutely sure.

Q. You are the secretary of the corporation and handle the affairs in the manner that you described?

A. That's right.

Q. And you handled the partnership affairs and have been doing so in the manner you have described? A. That's right.

Q. Wouldn't you know whether the partnership paid for the wrecking of the building?

A. I wouldn't know at this time; I would not remember now. I would probably have known it at the time.

Q. Did the corporation, or has the corporation at any [120] time since January 1, 1941, engaged in any such transactions or made payments for the removal of the building, or otherwise?

A. That is the only building that we would have removed.

(Testimony of Louis C. Scharpf.)

Q. And being the only one, you would normally know whether the corporation had it removed or whether the partnership had it removed, wouldn't you?

A. Well, I couldn't say. All I could say is that the partnership removed the building because we had to remove the building, and we had to use the property.

Q. Mr. Scharpf, what is the age of your son, George L. Scharpf? A. Thirty-three.

Q. At the present time? A. Yes.

Mr. Pigg: I think that is all I have.

The Court: The Petitioner will proceed with the redirect examination.

Redirect Examination

By Mr. Davidson:

Q. Mr. Scharpf, is it possible that perhaps it did not cost anything to remove the building, that somebody might have removed the building for getting the building, that is, taking it off for the building itself?

A. It could have been at that.

Q. You don't remember? [121]

A. I don't remember the details of it.

Q. Who handled that? A. Mr. Rogers.

Q. Now, Mr. Pigg brought out on cross examination that the partner's contribution to the capital of the partnership of \$7500 consisted of funds owing by the corporation to you, Mrs. Scharpf, and Mr. And Mrs. Rogers, and your son George, didn't he?

(Testimony of Louis C. Scharpf.)

A. Yes.

Q. Were those bona fide debts from the corporation to you? A. That is correct.

Q. And was there a salary legally due you at that time? A. Yes.

Q. In the amounts shown? A. Yes.

Q. How about George's indebtedness from the corporation; how did that originate?

A. Well, George, as well as Bill, fell heir to some money from their grandmother, and they loaned it to the corporation in order to get some interest.

Q. And were they paid for the money that they loaned to you.

A. We certainly did pay them.

Q. You and Mrs. Scharpf paid them for the money [122] borrowed?

A. We certainly did.

Q. Was there any reason that the corporation would not have to pay this debt in cash if you handled the transaction that way?

A. There is no reason at all; it was just a way of handling it.

Q. You could have withdrawn the money as cash, and then put it into the partnership as cash?

A. Yes.

Q. Wasn't the effect the same, that all you did was to reduce the purchase price of the assets by the amount of this indebtedness?

Mr. Pigg: That is leading, I will object to it.

The Court: Yes, it is leading.

(Testimony of Louis C. Scharpf.)

A. It was simply a matter of bookkeeping. We could have issued a check for my salary and for the salary of Mr. Rogers, and the dividends, and all that, and the interest, and then given the checks back; it is all one and the same thing.

Q. (By Mr. Davidson): Mr. Scharpf, you testified that Mrs. Scharpf, to your knowledge had not voted her stock contrary to your wishes. Is that correct? A. Yes. [123]

Q. Did you ever vote her stock contrary to her wishes? A. No.

Q. As a matter of fact, you and Mr. Rogers controlled the corporation as against Mrs. Scharpf, didn't you? A. Yes, I think so.

Q. You testified that your duties were the same, in general at January 1, 1941, in connection with the partnership as they were in connection with the corporation prior to that?

A. That's right.

Q. Was that true of the employees? Did the truck drivers continue to drive the trucks?

A. Just the same way.

Q. Were there any differences in your duties from what they would have been if the corporation had been entirely dissolved.

A. None whatsoever.

Q. In other words, they were the normal duties of carrying on the business?

A. That is correct.

(Testimony of Louis C. Scharpf.)

Mr. Davidson: I would like to have this marked for identification.

The Clerk: Petitioner's No. 30.

(The document referred to was marked as Petitioner's Exhibit No. 30 for identification.)

Q. (By Mr. Davidson): I hand you here, a document marked for the purposes of identification as Petitioner's No. 30 (indicating). Referring only to the printed matter on that, will you tell me what that piece of paper is?

A. This is the letterhead of the Twin Oaks Builders Supply Company, a corporation.

Q. And in what way is that designated as the corporation letterhead?

A. It has the name of John J. Rogers as President, and L. C. Scharpf as Secretary, at the top of the letterhead.

Q. Was that letterhead in use prior to the formation of the partnership? A. Yes.

Mr. Davidson: I would like to offer in evidence Petitioner's 30.

The Court: Is there any objection?

Mr. Pigg: No objection.

The Court: It will be received in evidence and marked as Petitioner's 30.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 30 for identification, was received in evidence as Petitioner's Exhibit No. 30.)

(Testimony of Louis C. Scharpf.)

Mr. Davidson: I would like to have this document marked as the next Petitioner Exhibit.

The Clerk: Petitioner's 31. [125 & 126]

(The document referred to was marked as Petitioner's Exhibit No. 31 for identification.)

Q. (By Mr. Davidson): I hand you herewith a document which has just been marked for identification as Petitioner's 31. Will you tell me what that is?

A. That is the letterhead of the Twin Oaks Builders Supply Company, the partnership.

Q. In what way is it distinguished from the letterhead of the corporation?

A. It does not have the names of the officers.

Q. Was this letterhead, Petitioner's Exhibit 31, in use by the partnership after January 1, 1941?

A. Yes.

Mr. Davidson: We offer that in evidence.

The Court: Is there any objection?

Mr. Pigg: There is no objection.

The Court: It will be admitted and marked as Petitioner's 31.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 31 for identification, was received in evidence as Petitioner's Exhibit No. 31.)

Q. (By Mr. Davidson): Now, did you represent to anyone after January 1, 1941, that the operating company, the Twin Oaks Builders Supply [127] Company, was a corporation? A. No.

(Testimony of Louis C. Scharpf.)

Q. Did you file an assumed name certificate?

A. Yes.

Q. Did you understand that that was a notice to the world that you were in partnership?

A. That is the reason I figured it, and it had to be published in the paper.

Q. Mr. Scharpf, I hand you Petitioner's Exhibit 5, being a statement of the earning of the partnership for the calendar years 1941 to 1944. The final figures at the bottom of each column show the net income for each of the years. Will you state whether that income is before or after salaries for yourself and Mr. Rogers.

A. That would be before there was any salaries deducted.

Q. In other words, the income of \$29,000 for 1941 was before any salaries?

A. That is correct.

Q. And for 1942 the income of \$18,000 was before any salaries? A. That is right.

Q. And the same for 1943 and 1944 \$44,000?

A. Yes.

Q. The income tax return in evidence for 1944 [128] shows a salary of \$14,000 for the two of you.

A. For Mr. Rogers and myself.

Q. Yes? A. Yes.

Q. Was there any increase in the salaries between 1941, and 1942, if you know?

A. So far as common labor was concerned, there was an increase.

(Testimony of Louis C. Scharpf.)

Q. Was there any increase in salary?

A. Well, I don't know. There perhaps was.

Q. Now, you spoke about wanting to go into the partnership so that you could liquidate your interest. Will you explain that a little bit further?

A. Well, that was one reason that I wanted to go into the partnership, so that my interest could be liquidated in case I wanted to get out. The other reason would be, I wanted to get a real owner's interest in the business.

The Court: I think that was gone into quite thoroughly yesterday.

Mr. Davidson: I thought there might be some misunderstandings because of the cross-examination.

Q. (By Mr. Davidson): Have you finished your answer?

A. I just wanted to get an owner's interest in there, so that I would have a decent share of the profits available [129] to me, if any.

Q. Mr. Scharpf, have you prepared a financial statement for yourself as of January 1, 1941?

A. Yes.

Q. Do you have it? A. I have it here.

Q. Will you give it to me?

A. Surely. (Hands document to counsel.)

Mr. Davidson: I would like to have this marked for identification.

The Clerk: Petitioner's 32 for identification.

(The document referred to was marked as
Petitioner's Exhibit No. 32 for identification.)

(Testimony of Louis C. Scharpf.)

Q. (By Mr. Davidson): I have a document marked as Petitioner's 32 for identification. Is that your financial statement as of January 1, 1941?

A. That is it.

Q. Did you prepare that personally?

A. Yes.

Q. Is it correct? A. Yes.

Mr. Davidson: I would like to offer it.

Mr. Pigg: No objection.

The Court: It will be admitted as Petitioner's 32. [130]

(The document referred to, heretofore marked as Petitioner's Exhibit No. 32 for identification, was received in evidence as Petitioner's Exhibit No. 32.)

Mr. Davidson: That is all.

The Court: You may stand aside.

Mr. Pigg: Just a minute, I have some re-cross.

The Court: Let us not go over the same thing.

Recross Examination

By Mr. Pigg:

Q. Mr. Scharpf, what was the rate of interest paid by the corporation to your son, George L. Scharpf, for any sums borrowed from him?

A. I could not say accurately. I think it was four per cent, but I don't know.

Q. Who is W. L. Scharpf?

A. That is my younger son.

Q. How old is he?

A. He is thirty-one now.

(Testimony of Louis C. Scharpf.)

Q. As far as any interest paid by the corporation for sums borrowed, would the interest rate be the same?

Mr. Pigg: That is all, Your Honor.

The Court: You may stand aside.

(Witness excused.)

The Court: Call the next witness.

Mr. Davidson: I will call Mr. Rogers. [131]

Whereupon,

JOHN J. ROGERS

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Will you state your name?

A. John J. Rogers.

Q. Mr. Rogers, in the interest of shortening the time, most of the matters were stipulated to. You were and are a president of the Twin Oaks Company at Eugene? A. That's right.

Q. And you became interested in the company in 1928? A. Yes.

Q. And you are one of the partners in the Twin Oaks Builders Supply Company? A. Yes.

Q. And you have owned and still own some 473 shares of the capital stock of the Twin Oaks Company, which amounts to one half of the outstanding capital stock? A. That is right.

(Testimony of John J. Rogers.)

Q. Now, Mr. Rogers, when was the matter of forming a partnership to carry on the operations first broached to you? [132]

A. I would have to, of course, give an approximate date, because I cannot remember eight or ten years back very accurately. I can only say approximately the time.

Q. Yes, we understand.

A. The incorporation was in the first of January, 1941, and I would estimate that Mr. Scharpf had been discussing this matter with me for fifteen or eighteen months.

Q. Did the suggestion come from Mr. Scharpf?

A. Absolutely.

Q. When this suggestion was first made, were you agreeable to it? A. No sir.

Q. And what were your objections?

A. They were the same always; I have been in business for,—up to that time I had been in business for almost 40 years, and entirely in a corporation. And I am not a lawyer, but my experience had all been with corporations, and I knew something about them and I preferred them. I knew that a partnership had unlimited liability. After the other war, I lost practically everything I had, and I didn't want to jeopardize what I had in 1940 and 1941 by going into a new type of business structure.

Q. You did, however, consent to the formation of a partnership?

A. After a long negotiation. [133]

(Testimony of John J. Rogers.)

Q. Why did you consent to it?

A. Because of my high respect for my partner, and because of the knowledge that business men either get along together or they do not get along, and in such cases, they do not succeed.

Q. Why didn't you dissolve the corporation?

A. I felt that as a measure of safety, in the event of anything happening to the partnership, the structure of the corporation would still be left, and we could start on again.

Q. What was Mr. Scharpf's attitude toward dissolving the corporation?

A. He wanted to dissolve the whole thing.

Q. You prevailed then on that point?

A. Yes.

Q. Now, at whose suggestion was it that Mrs. Rogers be taken into the partnership?

A. Well, we had been two families in that business up to 1941, the Scharpf family and the Rogers family, and although I was the only member of the corporation, still it was a family affair purely and simply, and we were a very friendly partnership; there were two Scharpfs and one Rogers, and I felt that the balance should be maintained. Furthermore, Mrs. Rogers had some money that she would like to put into the partnership, and I could see no reason why she should not [134] do it, and there was no objection on the part of Mr. and Mrs. Scharpf to that attitude, and, I would say, briefly, that was the reason.

(Testimony of John J. Rogers.)

The Court: Were those separate funds that Mrs. Rogers used, which went into the business?

The Witness: Judge, every penny of it was hers. She had more if it had been wanted.

Q. (By Mr. Davidson): Did you discuss the matter of income taxation at or about the time the partnership was formed with anyone?

A. Yes.

Q. With whom did you discuss it?

A. May I elaborate a little bit on my answer, and not answer by just "yes" or "no"?

Q. Yes.

A. We had not been making any money. For ten or eleven years, we had three or four years where we had lost during the depression, and our average years I am embarrassed to tell you what they were prior to 1941, but if you wish me to tell you, I will.

Q. What were they?

A. They were about \$1100 a year for about eleven years. The matter of taxes, of the income, and that sort of thing, that was not a matter of consideration, excepting that, as a part of this structure, we would naturally go into it. [135] When a man goes into a new type of business, he naturally discusses the tax angles, but it was not discussed with the idea of reducing the tax. I didn't know whether they were going to be increased or decreased; I didn't care, because our profits were so small.

(Testimony of John J. Rogers.)

Q. Do you know about the removal of this house from the McCormack property that Mr. Scharpf testified about?

A. Of course I have a pretty fair memory, but we have a good bookkeeper and the books have been carried quite accurately, or, very accurately. I *should and* they show the correct details. However, I can tell you a lot about that. I am quite positive that we had a wrecker take out the doors and windows and the plumbing fixtures and the bathroom, and I think the wrecker got them for wrecking it.

Q. Your recollection is that neither the partnership or the corporation, paid anything for it?

A. No, I don't think so. I would say that is ninety five per cent correct. It may be a hundred per cent correct; I think it is, possibly.

Q. Do you remember anything about the rates of rental on the Orem property?

A. Mr. Scharpf stated that accurately; we got \$66.67. I remember it, because it ran for quite a number of years, and that is the way it was.

Q. Has it been that way since? [136]

A. There has been no change since the old building was bought.

Mr. Davidson: That is all. You may cross examine.

The Court: What about the rental that the parties agreed to pay the corporation?

The Witness: The whole rental was \$250.

(Testimony of John J. Rogers.)

The Court: The partnership agreed to pay that to the corporation?

The Witness: Yes.

The Court: Was that the ordinary or usual rental for that property?

The Witness: May I tell you, that for ten years the State Highway Commission has had drawings made and plans perfected to put a highway right through our structure, our plant, not only in Eugene, but in Cottage Grove, Oregon, also, and we, in arriving at the rentals, to the very best that honest men could do, we think we arrived at a fair amount.

The Court: And what percentage would that be on the valuation of the property?

The Witness: Oh, I would say,—I would say about between 7 and 9 per cent.

The Court: The rental would be from 7 to 9 per cent of the value of the property?

The Witness: Yes; but the value was indeterminate.

The Court: But the way you regarded the property, [137] it was from 7 to 9 per cent of what you considered to be the value of the property?

The Witness: Yes.

The Court: And you considered that as a reasonable rental, did you?

The Court: That is all I have. Are you through with the direct examination?

Mr. Davidson: Yes, I am.

(Testimony of John J. Rogers.)

The Court: We will take a ten-minute recess.

(Whereupon a ten-minute recess was taken.)

Mr. Davidson: I would like to ask a couple more questions, if the Court please.

Q. (By Mr. Davidson): Mr. Rogers, during the year 1941 and subsequent thereto, the building materials business has been operated at Junction City and Eugene; is that right? A. That is right.

Q. About what proportion of sales are made in each of those two places?

A. Well, about one tenth of the total is made at Junction City.

Q. And the balance at Eugene?

A. That is right.

Q. When did the corporation acquire the Cottage Grove property? [138]

A. In 1929, I think.

Q. And how much did it cost?

A. It cost approximately eight or nine thousand dollars.

Q. What was that property? Was that a going retail lumber yard at the time you bought it?

A. Yes.

Q. And did the Twin Oaks Builders Supply Company, a corporation, continue in business there?

A. For ten years.

Q. When did you quit?

A. Not ten years, we operated there for about eight years.

Q. When did you quit the business there?

(Testimony of John J. Rogers.)

A. 1937.

Q. What was the status of that property when you quit the business in 1937, and up to 1940?

A. It was non-productive.

Q. Has it been operated as a yard since that time? A. No sir.

Q. And what has been done to the property now?

A. Well, it was a big shell of a warehouse, and it was strongly built, and in the course of time it became useful and used by various people living down there for storage of automobiles and farm implements, and things of that kind.

Q. Now, what was the cost of the Junction City property [139] owned by the corporation as of January 1, 1941?

A. I think I can be quite accurate about that. We rented a restaurant in the store, in the stern, and about two or three lots in the back; and the lots in the back and the small sheds, they were about,—I would say the cost was around \$2500.

Q. And that \$2500 was the only investment that the corporation had in Junction City?

A. Yes.

Q. Did the partnership take over the lease on the rented property? A. Yes.

Q. And that was owned by strangers?

A. Yes.

Mr. Davidson: That's all.

The Court: Proceed with the cross examination.

(Testimony of John J. Rogers.)

Cross-Examination

By Mr. Pigg:

Q. Mr. Rogers, as I understood you, you mean that the business, as such, was discontinued at Cottage Grove in 1937? A. That's right.

Q. And since that time the property has been used for a yard, as a facility of business in general,—a storage yard?

A. Well, it has been a shed there, but it has been non-productive of revenue. [140]

Q. When you say non-productive, is that because you made no sales from there?

A. I mean just like a building over here that stands idle, producing no revenue.

Q. But you store lumber over there, or did?

A. No sir.

Q. You didn't use it as a storage facility?

A. It is about 22 miles, Mr. Pigg, from Eugene; it is an impractical distance to store materials and carry them back and forth. We have wished a thousand times it was a lot nearer so that we could use it.

Q. It was not any use of or any facility of the business whatsoever, and has not been since January 1, 1941?

A. I was not quite as accurate as that. I gave Mr. Hyde a memorandum showing the income from the warehouse, and it did include a few hundred dollars in 1940; yes, I think that is right.

Q. These people are residents of Cottage Grove

(Testimony of John J. Rogers.)

who use it for storage purposes, as you mentioned, and they pay you rentals for the use of it, do they not? A. Yes.

Q. As concerns the rentals paid by the partnership to the corporation under the lease agreement, I believe you said you figured that was from 7 to 9 per cent of what you regard as the value of the property? [141] A. Yes.

Q. Was that before or after taxes and depreciation?

A. Well, I didn't figure it as accurately as that; I did not figure it that way.

Q. Under the lease agreement, the corporation is required to pay the taxes, is it not?

A. I think so. Will you ask that question again?

Mr. Pigg: Will you read the question, Mr. Reporter.

(Whereupon the above question was read aloud by the reporter as above recorded.)

A. Yes.

Q. What is the answer? A. Yes.

Q. (By Mr. Pigg): And the obligation of the lessee was to return the property or surrender the property upon the termination of leasehold in as good a condition as received, subject to ordinary depreciation and wear and tear; is that correct?

A. I think so.

Q. Mr. Rogers, do you happen to know the rate of interest that was paid by the corporation and

(Testimony of John J. Rogers.)

written off in a sum loaned the corporation by the sons and children of Mr. and Mrs. Scharpf?

A. Those notes run back quite a while. I am guessing but I would say they are about four per cent; maybe four or [142] five per cent.

Q. In the conduct of your business, and from your business experience in general over the period of years that you have described, did you ever have occasion to negotiate commercial loans with the banks and other financial institutions?

A. Yes.

Q. Are you familiar with the prevailing interest rate in Eugene on commercial loans from banking institutions?

A. Well, we don't borrow much money. We occasionally do, but when we do the banks are good customers of ours and when we want some money we sign the note and observe the rates. We do not dicker for the rates.

Q. What rates of interest do you pay in those instances, as a rule? A. About five per cent.

Q. As high as six per cent sometimes?

A. Yes.

Q. On commercial loans?

A. Yes; in some years it has been as high as eight or ten; sometimes six and sometimes five.

Q. Commercial loans are generally unsecured loans, are they not? A. Yes.

Q. Speaking of January, 1941, what would have been, [143] according to your business experience,

(Testimony of John J. Rogers.)

the probable prevailing interest rate on commercial loans at that time?

A. Mr. Pigg, I would like *to on* record, but I cannot; it would be an inaccurate answer, and you want a positive answer.

Q. You don't know?

A. Now I would not say, sir.

Q. The small profits that you mentioned as having been earned by the corporation,—net profits,—in the earlier years, or prior to 1941, I think you related your answer to that,—was that before or after the payment of officers' salaries?

A. That was net.

Q. After payment of salaries? A. Yes.

Q. So far as the taxation aspect of the transaction made in January 1941 was concerned, with whom were those matters discussed, if at all?

A. Well, it was talked back and forth. I was entirely hostile to the idea, and the matter of dodging taxes was not part of my mental thought. Taxes are a part of a business man's thoughts, these days, and they were, of course, discussed by my partner, Mr. Scharpf and by myself, and I know I must have mentioned that to Mr. Collins with the idea of finding out what the situation was. As I say, we had made no money, and taxes were of no vital concern, and I wanted to be sure [144] that the partnership arrangement created no increase in taxes, that is, to the partners; and he shared my thought. I presume I should have known that, I am frank to

(Testimony of John J. Rogers.)

admit that that is a statement that I made to him. I discussed with Mr. Bryson, in a non technical way. I discussed it with business friends, that is, not necessarily taxes, but I discussed the change.

Q. Did Mr. Collins advise you of the tax aspects of the situation?

A. He told me I think,—Mr. Pigg, you are asking me questions that are eight years old.

Q. I realize that, but we cannot control that.

A. My memory is not one hundred per cent and I want to be truthful. He told me that the taxes would not be raised. It was to that effect.

Q. Does your memory serve you sufficiently so that you can tell me whether or not the tax aspect, according to the information given you would operate to reduce the matter of the overall tax?

A. I would say that he possibly may have discussed that.

The Court: Was the testimony of the change from the corporation to the partnership that it was for the consideration of reducing taxes; was that any part of your thought?

The Witness: No sir. My reason for changing to the partnership was for cooperation and teamwork with a man [145] I have worked with for fifteen years, who wished that, who had been conducting the sales department.

Q. (By Mr. Pigg): Mr. Rogers, prior to 1941, the Twin Oaks Builders Supply Company had had controversies with the Department, or the Bureau

(Testimony of John J. Rogers.)

of Internal Revenue on tax matters, had it not? I will relate it to another matter, so far as taxes for officers salaries are concerned? Does that refresh your memory?

A. I think there was some controversy; I think there was some controversy as to the salaries we were allowing ourselves.

Q. Concerning the amount that Mrs. Rogers put into the business in 1941 and the amount that she actually put up in cash, that was \$500, wasn't it?

A. She put up \$2000.

Q. How did she put up the \$2000?

A. Well, as I recall it, the Twin Oaks Company, the corporation, was owing her \$1500. We had agreed among the group that \$8000 was an adequate amount for refinancing. Our average borrowings had been about \$6500 in the previous four or five years, so we figured \$8000 was an adequate amount. She had the \$1500 available from the corporation. My sons have funds left them by their grandparents, and she turned to Bob and borrowed by a note, which she signed and he [146] accepted, and which has since been paid; and I think it can be produced. That was with respect to the \$1500. And she had not only that five hundred dollars that she could draw upon, but she had other assets, too.

Q. Under the arrangement, as it was actually consummated, it was only necessary for her to put up \$500 cash?

(Testimony of John J. Rogers.)

A. In addition to what the corporation owed her.

Q. And that only represented an indebtedness to the corporation in the sum of \$1500.

A. It was as good a note as was ever written; it was due and payable.

Q. And after the partnership transaction, the corporation owed no longer the \$1500 under the arrangement that she made? A. That is right.

Q. The note, the \$1500, so far as that was concerned, that went into the partnership business?

A. Oh, yes; that is a technical point. The corporation paid her the \$1500.

Q. How did it pay her the \$1500?

A. I suppose in the normal way. I have not the books, but I suppose it was paid by a check.

Q. Mr. Rogers, assuming that Petitioner's 9, which is the minutes of the special meeting of the board of directors of the Twin Oaks Builders Supply Company, dated January 2, 1941, [147] discloses, as a fact, that as to Mrs. Rogers there was a cancellation of an indebtedness owing by the corporation to Mrs. Rogers to the extent of \$1500. Would you say that is a correct statement of the transaction?

A. I would not dispute those minutes.

Q. Is that your understanding as to what actually happened?

A. If you had met me on the street and asked me how the transaction was made, I would have told you that I presumed the corporation paid Mrs.

(Testimony of John J. Rogers.)

Rogers \$1500 with a check, and that she took that check, and deposited it in the bank, and added \$500 which she got from her son, which would make \$2000, and then turned that over to the partnership.

Q. If the records show otherwise?

A. Whatever is honest and is a fact, of course that would prevail.

Q. Do you know at whose suggestion it was that the capital contributions to the partnership were handled in that manner as they actually were? Who made the suggestion that the matter be handled in that way?

A. Explain what you mean, please.

Q. I mean, that, according to the exhibits and the evidence of record, \$7500 of the \$8000 that you mentioned represented cancellations of indebtedness owing by the corporation to the several parties.

A. That's right.

Q. And the remaining \$500,—

Mr. Davidson: In the interest of the economy of time, I am going to object. This matter is absolutely immaterial as to how that was put in or just what was done, whether it was done by check or not.

The Court: Well, I think it is all right to go ahead and prove all the facts surrounding it. I will overrule the objection.

Q. (By Mr. Pigg): And the remaining \$500 was a cash contribution paid by Mrs. Rogers. Now,

(Testimony of John J. Rogers.)

at whose suggestion, or upon whose advice, if anyone's was the transaction carried out or consummated in that manner?

A. Well, we were going into a new deal, and we needed a little more capital, apparently. We needed \$8000, and I presume Mr. Scharpf and I talked that over, and we probably discussed it with Mr. Bryson, and we probably discussed that with Mr. Collins. I am quite sure that we did.

The Court: Each of you had a \$2000 interest in the partnership, equally?

The Witness: That is right.

Mr. Pigg: I don't recall, Mr. Rogers, whether you stated at whose suggestion it was that Mrs. Rogers was brought into the partnership? [149]

A. I think I probably made that suggestion.

Q. What was the purpose of bringing her into it?

A. Well, there were two Scharpfs, Mr. and Mrs. Scharpf, and in the event of a vote we wanted equal representation on the Rogers family. I wanted her more intimate familiarity with the business.

Q. The business, I believe you said, in substance, was more or less of a family affair or a two-family affair in the beginning, prior to this transaction in January 1941?

A. That is right.

Mr. Pigg: That is all I have, Your Honor.

The Court: Are there any further questions?

Mr. Davidson: Just a question or two.

(Testimony of John J. Rogers.)

Redirect Examination

By Mr. Davidson:

Q. Mr. Rogers, so far as the indebtedness to Mrs. Rogers was concerned, was that a bona fide indebtedness of the corporation.

A. One hundred per cent.

Q. Whose funds did she loan to the corporation?

A. She loaned her own funds.

Mr. Davidson: That's all.

Mr. Pigg: No further question.

The Court: You may stand aside.

(Witness excused.) [150]

The Court: Call your next witness.

Mr. Davidson: Mrs. Scharpf.

Whereupon,

EVA M. SCHARPF

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Will you state your name?

A. Eva M. Scharpf.

Q. Mrs. Scharpf, you are the wife of Louis C. Scharpf? A. Yes.

Q. And you are a stockholder of the Twin Oaks Company, the Petitioner herein? A. Yes.

(Testimony of Eva M. Scharpf.)

Q. And also an equal partner in the Twin Oaks Builders Supply Company, the partnership?

A. Yes.

Q. According to Petitioner's Exhibit 18, which is in evidence, you were, on January 1, 1941, the owner of 437.7 shares of the capital stock of the Twin Oaks Company; is that substantially correct?

A. It is.

Q. And did you purchase those shares of stock with [151] your own funds? A. Yes.

Q. And what was the source of your funds?

A. I inherited them.

Q. From whom? A. My father.

Q. What was his name?

A. George P. Fanning.

Q. When did he die? A. 1923.

Q. Approximately what was the net amount of your inheritance?

A. It was between \$45,000 and \$50,000.

Q. Well now, you were a party to the partnership agreement which was executed in January, 1941, between the Twin Oaks Company, the corporation, and the Twin Oaks Builders Supply Company, the partnership? A. Yes.

Q. Did you enter into that voluntarily?

A. Yes.

Q. You understood what was done?

A. Yes.

Q. You understood that you were becoming liable as a partner from then on?

A. Yes. [152]

(Testimony of Eva M. Scharpf.)

Q. And you were aware of the fact that Mr. Scharpf would then have one fourth interest in the partnership? A. Yes.

Q. Have you prepared a personal financial statement as of January 1, 1941? A. Yes.

Q. Do you have it? A. Yes.

Q. May I have it?

A. Surely (hands document to counsel).

Mr. Davidson: I will ask that that be marked for identification with the next exhibit number in order.

The Clerk: Petitioner's 33.

(The document referred to was marked as Petitioner's Exhibit No. 33 for identification.)

Q. (By Mr. Davidson): I hand you here a document marked as Petitioner's 33 for identification; will you say what that is?

A. That is a financial statement of Eva M. Scharpf as of January 1, 1941.

Mr. Davidson: I will offer in evidence.

The Court: Is there any objection?

Mr. Pigg: No objection.

The Court: It will be admitted in evidence and marked as Petitioner's 33. [153]

(The document referred to, heretofore marked as Petitioner's Exhibit No. 33 for identification, was received in evidence as Petitioner's Exhibit No. 33.)

Mr. Davidson: I would also like to have this

(Testimony of Eva M. Scharpf.)

marked for identification with the next exhibit number.

The Clerk: Petitioner's 34.

(The document referred to was marked as Petitioner's Exhibit No. 34 for identification.)

Mr. Davidson: I offer at this time as Petitioner's 34, a duly and properly certified certificate of the probate record in the matter of the estate of George P. Fanning.

The Court: Who was Mr. Fanning?

Mr. Davidson: He was the father of Mrs. Scharpf, who is testifying.

Mr. Pigg: No objection. As I understand it, it is only collaborative.

The Court: It will be admitted and marked as Petitioner's 34.

(The document referred to, heretofore marked as Petitioner's Exhibit 34 for identification, was received in evidence as Petitioner's Exhibit No. 34.)

Mr. Davidson: That is all for me.

Cross-Examination

By Mr. Pigg:

Q. Mrs. Scharpf, concerning the partnership agreement [154] that you signed on January 1941, and your understanding of it as you have explained it here, what is the fact as concerns your family relationships between your husband and yourself as to the family investment in the Twin Oaks business before January 1941, as compared thereafter.

(Testimony of Eva M. Scharpf.)

A. Well, I had most of the stock in the corporation, and then in the firm,—in the partnership,—

The Court: Speak a little louder.

The Witness: I had most of the shares in the corporation, and then when they formed the partnership Mr. Scharpf felt it was not any more than right that I ought to go in as a partner, having had so many shares in the corporation.

Q. You went in in that manner at the suggestion and request of your husband? A. Yes.

Q. And you understood at that time that, under the partnership arrangement, he was to receive one fourth of the total earnings as compared with or as distinguished from the dividends on the number of shares that he held in the corporation?

A. Yes.

Q. Did you regard the investment in the business of the Twin Oaks Company, or the Twin Oaks Builders Supply Company, so far as you and your husband were concerned, as a family unit, any differently after 1941 than you did before. [155]

A. When I held the shares in the corporation I had nothing to do with it, only I had the shares in there. When we formed the partnership, then I had a little more to do with it.

Q. What more did you have to do with it?

A. Well, I signed the checks, and went down and wrote up the accounts receivable, and became familiar with the business.

Q. And that is about all? A. Yes.

(Testimony of Eva M. Scharpf.)

Q. Did you, in consideration of that and in return for that, under the terms of the partnership agreement, give up an interest or a part of your interest to your husband; didn't you?

A. What do you mean, I gave up?

Q. Strike the question. Insofar as you are concerned, under the partnership arrangement, did you consider that you had as much of an interest in the business after 1941 as you had prior to that time?

A. I had a more active interest in it.

Q. Mrs. Scharpf, I hand you Petitioner's Exhibit 21. That is the letter of notification to the First National Bank of Eugene, which is in evidence in this case, and which relates to the authorization of the partners to borrow money from the bank. Isn't that correct? [156]

A. Yes.

Q. Did you ever at any time after the date of that instrument exercise any of the authority described or referred to therein, by borrowing from the bank for business purposes?

A. I think I signed notes, if that is what you mean.

The Court: What is the answer?

The Witness: I think I signed notes, if that is what you mean. I signed anything that had to be signed by myself. Who else signed the notes?

A. Mr. Rogers, Mr. Scharpf, and Mrs. Rogers.

Q. Is it your recollection that any sums were actually borrowed by the partnership for which notes were given after 1941?

A. Yes.

(Testimony of Eva M. Scharpf.)

Q. And to the extent that that occurred, it was handled in the way that you have described?

A. Yes.

Q. Mrs. Scharpf, am I correct in my understanding of the purport or the effect of your testimony, that as far as you are concerned, you did not consider or regard yourself as having given up or surrendered anything to your husband as a result of any interest that your husband acquired as a result of the partnership arrangement?

A. No, sir.

Mr. Pigg: That's all. [157]

Mr. Davidson: That's all.

The Court: You may stand aside.

(Witness excused.)

The Court: Call the next witness.

Mr. Davidson: I will call Mr. Rodman.

Whereupon,

JAMES A. RODMAN

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. What is your name?

A. James A. Rodman.

Q. What is your business or occupation?

A. Real estate business.

Q. At what point? A. Eugene, Oregon.

(Testimony of James A. Rodman.)

Q. How long have you been in the real estate business there? A. 13 years.

Q. During your experience there have you handled the sale of or the rental of business properties in Eugene? A. Yes.

Q. To a large extent? [158]

A. Well, I have handled them as a broker, and I have also bought and sold property.

Q. Are you familiar with the values and rental rates of business property in Eugene, as of January 1, 1941? A. Yes.

Q. Are you familiar with the Eugene property of the Twin Oaks Builders Supply Company as existed on January 1, 1941?

A. Pretty much, so, yes.

Q. What would you say, based on your experience, would you consider to be a fair monthly rental for that property as of January 1, 1941?

A. I would have to base that on the general picture, because I know of no comparable site that was leased or sold in 1941.

Q. Do you think you could base it on your general knowledge? A. I think so.

Q. What would that be.

A. I would say \$150 a month, or at the top, \$175.

Q. Is that the property at Eugene?

A. Yes.

Q. Is that a general business property?

A. What do you mean?

(Testimony of James A. Rodman.)

Q. Perhaps I should say a general purpose property, as [159] a business property?

A. No, sir.

Q. Is it adaptable for anything but a lumber yard?

A. I would say that the highest and best purpose is the lumber business.

Q. Are you familiar with the property occupied by the Long-Bell Lumber Company in Eugene?

A. I have never been in the interior. I pass it every day and I have passed it every day for years. I live out beyond there.

Q. What would you say, in general as to the rental value of that property as it existed in 1943 or 1944, and how it compares with the rental value of the Twin Oaks Property as it existed in 1941?

Mr. Pigg: I object, Your Honor, because the witness has already said he is not familiar with the Long-Bell property.

The Court: If he knows. Do you know what the value was?

The Witness: I would say, from an exterior inspection——

The Court: Can you tell us or can you judge its rental value from what you saw?

The Witness: Well, I think so.

The Court: Answer the question, then, if you know. [160]

Q. (By Mr. Davidson): We want to know how they compare?

(Testimony of James A. Rodman.)

A. I would say that the other property, the McDonald property, would have a rental value of fifty per cent more than the Twin Oaks.

Q. By the McDonald property, you mean the property now occupied by the Long-Bell Lumber Company, formerly occupied by the McDonald brothers? A. Yes.

The Court: The witness who testified yesterday was from the Long-Bell Company?

Mr. Davidson: Yes.

The Court: And that is the property that you are comparing it with?

Mr. Davidson: Yes.

The Court: Is there anything further?

Mr. Davidson: That is all on direct.

The Court: You may cross-examine.

Cross-Examination

By Mr. Pigg:

Q. Mr. Rodman, how long did you say you had been familiar with the Twin Oaks property in Eugene?

A. Well, I have been familiar with it for about 15 years; ever since I have lived in Eugene.

Q. Can you testify as to any familiarity with any of the Twin Oaks properties in Junction City?

A. No, sir.

Q. The same is true with Cottage Grove?

A. Well, I do know something about the Cottage Grove property. I had another real estate office at Cottage Grove. My son was in charge of the opera-

(Testimony of James A. Rodman.)

tion in Cottage Grove, and the building down there was pointed out to me, which was a large building which they tried for two or three years to rent, through my office, but my son was unable to rent it.

Q. Were you in the court room this morning?

A. Yes.

Q. When Mr. Rogers testified? A. Yes.

Q. You did hear Mr. Rogers testify that the property that they owned in Cottage Grove was rented by various residents down there for storage purposes, didn't you? A. Yes.

Q. I believe you said, that in your opinion, about \$150 was the top or high rental value or fair rental for the Eugene property?

A. I said I thought \$150 would be a fair rental, with a maximum of \$175.

Q. That is a maximum of \$175, the Eugene property?

A. Yes, that is right. You are speaking as of 1941?

Q. 1941, January 1, 1941.

A. That is right. [162]

Q. Aside from your general familiarity with the property as you have described it, when, if ever did you make a detailed or personal inspection or examination of the properties for the purpose of arriving at your opinion as to rental value?

A. My visits there, generally speaking, have been for business, that is, to buy, purchase retail in

(Testimony of James A. Rodman.)

the yard, and my visits have made me quite familiar with the property.

Q. You didn't go in there on those occasions with any purpose in mind of reaching a conclusion as to a fair rental value of the property, did you?

A. No, I was never employed for that purpose. A man in my office has made an approximation of the—an appraisement of the ground there, but I didn't pay any attention to what the appraisement was.

Q. So you have never made a special study or examination to examine into the several factors that would be material to determine the fair rental value of the properties on that date, have you?

A. My knowledge of the property was sufficient to make a decent estimate on what the rentals were on that property in 1941. I have been acquainted with the properties all over town.

A. You said, I believe, it was not a general purpose property, but that its highest use or value was as a lumber [163] yard or business.

A. That is right. A good part of the buildings are buildings for purely piling of lumber, and nothing else.

Q. Of course, that was the purpose for which the Twin Oaks Company owned or possessed the property, is that not correct? A. I presume so.

Q. And according to your testimony then, they were devoting the property to its most useful purpose and advantageous purpose?

(Testimony of James A. Rodman.)

A. I would think it was used to its most useful purpose, yes.

Q. As a facility for the type or character of business that was being carried on by the Twin Oaks Company, do you know of any property in Eugene that would have been superior property for the same purpose?

A. Up until the highway crossed there, until they were in anticipation, those were probably the ideal spots for lumber yards, the McDonald Lumber Company and the Twin Oaks Company and three or four of them in a row—until that matter was injected into the picture, the cutting of the highway into the property, I think they were excellent locations for that business.

Q. What did you know as to any matter or possibility of cutting a new highway through, which would affect the value [164] of the property?

A. I was advised that the State Highway Commission had made surveys through there.

Q. You knew that? A. Yes.

Q. Did you appraise this Twin Oaks property in connection with thought of the use of the property for the highway?

A. No, sir. I was president of the Chamber of Commerce, and the master sheet was laid down where we could go through it; it was a matter of conjecture as to whether they would go straight through.

(Testimony of James A. Rodman.)

Q. How long have they been in the Chamber of Commerce, these master sheets.

A. Not in the Chamber of Commerce but in the State Highway Department where we can see them.

Q. How long have they been available?

A. Those were among the possibilities; no surveys had definitely been made.

Q. No surveys had definitely been made?

A. Not as a definite matter. They don't make them definitely in the first place.

Q. Do you know, of your own knowledge as to when, if ever, it became a certainty there would be a highway put through which would touch this property? [165]

A. It is a certainty from now on.

Q. When did it become a certainty?

A. I would say a year or two ago; some of them, and some of them were in Court where they condemned the property.

Q. Is it or is it not a fact that the highway, as now contemplated, will not touch any of the actual property or buildings of the Twin Oaks Company?

A. I am not sure whether it cuts across a little corner of it; that would not affect the value in 1941, would it?

Q. That is what I was going to ask you next. Based upon the information that you have concerning the possibility and the knowledge of the sketch with respect to cutting through the new highway, what effect, if any, in your opinion would that

(Testimony of James A. Rodman.)

have on the value of the property, the Eugene property, as of January 1, 1941?

A. If they had made the cuts on some spots where they anticipated, it would have destroyed it; but so far as the rental value that I am speaking of, I am speaking of \$150 without the influence of that action. Had that been effected in 1941, it would not have had any value for rental of any kind.

Q. If you had been called upon to determine the fair rental value of the property as of January 1, 1941, assuming it was vacant, at that time, how much weight would you [166] have given to the fact, in reaching your conclusion, that it was then not occupied?

A. You don't couch your question so that I can find out what you want to get at.

Mr. Pigg: Will you read the question?

(Whereupon the last question was read aloud by the reporter as above recorded.)

A. How much weight would I give to it had it been unoccupied at the time?

Q. Yes, how important is that factor?

A. I suppose I would have to proceed on the capitalization method to determine what would have been the use of the property, if put to its highest use, and what its value would have been, that is, the Twin Oaks yard—that is, what reasonably could be expected to be the return, whether it was vacant or not. However, we do not take into consideration such factors in renting property of this kind; what

(Testimony of James A. Rodman.)

you would rent it for would be largely a matter of dickering.

Q. If you were out there for the purpose of determining a fair rental value, would you or would you not have a prospective lessee.

A. I would have hoped that we could create a prospective lessee.

Q. Would you have assumed it? [167]

A. I might assume it, but it might be a violent assumption if I would undertake to do so.

Q. How much weight would you give to the factor that you think would be a violent assumption?

A. Let us suppose that you have five lumber yards or lumber companies that are serving the community reasonably well. Naturally there wouldn't be much use for the sixth. There are many factors that you have to give weight to.

Q. In reaching your conclusion of \$150 to \$175 per month rental value, did you or did you not assume that there was an owner or prospective lessor of this same property, or comparable properties, and that there was in existence at that time, also, one or more persons who was in the market to lease the property?

A. Mr. Pigg, I am doing the reasoning now; I didn't do it in 1941.

Q. Let me finish the question. I am asking you about 1941, of course, in the final analysis. But in this particular question I was asking you as to the method of reaching your conclusion?

(Testimony of James A. Rodman.)

A. Will you state the question again?

Mr. Pigg: I will strike the question.

The Court: All right, strike the question.

Mr. Pigg: I think I have an answer, anyway, in the [168] answers that the witness has given. That is all.

Mr. Davidson: That is all.

The Court: You may stand aside.

(Witness excused.)

The Court: Call your next witness.

Mr. Davidson: I will call Mr. Martin.

Whereupon,

B. A. MARTIN

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Will you state your name?

A. B. A. Martin.

Q. What is your business?

A. Locating engineer for the Oregon State Highway Commission.

Q. Have you worked on the location for the highway in the route near the Twin Oaks Builders Supply Company at Eugene, Oregon?

A. I have.

(Testimony of B. A. Martin.)

Q. Did you prepare a map of the tentative location? A. I did.

Mr. Davidson: I would like to have this marked for identification.

The Clerk: Petitioner's 35.

(The document referred to was marked as Petitioner's Exhibit No. 35 for Identification.)

Q. (By Mr. Davidson): I hand you here a blueprint map, marked for the purposes of identification as Petitioner's 35, and I will ask you to state what that map is.

A. This is a map, a sketch map of the proposed route through the City of Eugene, which is known as the Sixth Street route.

Q. When was that prepared?

A. This map was prepared in January 1940.

Q. Was it prepared by you or under your direction?

A. It was prepared under my direction.

Q. Whose name appears on it? A. Mine.

Q. Your name appears on it?

A. Yes, it does.

Q. Is the location of the property of the Twin Oaks, at that time, the Twin Oaks Builders Supply Company—shown on the map?

A. It is shown here in red.

Q. What, with reference to that property, is the location of the proposed highway? [170]

A. Well, the southbound traffic lane goes right through the center of the Twin Oaks property.

(Testimony of B. A. Martin.)

Q. What effect would the construction of that highway on that location have had on the use of the property for a building material yard?

A. Well, it would have destroyed it if it had been built.

Q. What was the status of that survey on January 1, 1941?

A. The plans were worked up, the plans and estimates were worked up and were being worked up at that time, and they were submitted sometime later, I would say, to the State Highway Engineer or the State Highway Commission.

Q. At that time, January 1, 1941, then these were either submitted or were in the process of submission, but had not been either accepted or rejected by the Highway Commission; is that right?

A. That is correct.

Q. Are you familiar with what was then the McDonald Lumber Company in Eugene?

A. I am.

Q. And where is that located on this map with reference to the Twin Oaks property?

A. It is to the north, between Fifth and Sixth Streets, on the east side of High Street.

Q. Were you on or around both of these properties in [171] or about January 1, 1941?

A. I was.

Q. Will you state to the Court your opinion as to the nature of the two properties as to their comparative acreage?

(Testimony of B. A. Martin.)

A. Well, just looking at the map, I think the Twin Oaks might have had a little more land than the McDonald. It shows on this map, and this map is drawn to scale—it shows that the Twin Oaks property has a little larger area than the McDonald Lumber Company. The McDonald Lumber Company, however, seems to have a little more frontage on High Street than the Twin Oaks Lumber Company.

The Court: High Street; is that a permanent thoroughfare there?

The Witness: Yes, it is the route to the east side of the Mackenzie River, on what is known as the Coburg Road.

Mr. Davidson: I offer Petitioner's 35 in evidence.

Mr. Pigg: No objection.

The Court: It will be admitted and marked as Petitioner's 35.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 35 for Identification, was received in evidence as Petitioner's Exhibit No. 35.)

Mr. Davidson: You may cross-examine.

Cross-Examination

By Mr. Pigg: [172]

Q. Mr. Martin, I will hand you Exhibit 35, which is the same map or drawing you were examined about a while ago, is it not?

A. That is right.

(Testimony of B. A. Martin.)

Q. I believe you refer to the south survey, or the southbound lane. Can you identify that?

A. It is this line here, which is the westerly line of the two lines Ninth Street to Sixth Street—from Sixth Street to Ninth Street.

Q. It is the line that goes through diagonally a part of the square that is marked in red, as you described a while ago, is it not?

A. That is right.

Q. Now, when this other survey north of that one was made, when was that? Do you know when that was made, Mr. Martin?

A. You mean north or east?

Q. Whichever one that was.

A. It is north here (indicating). That line—I don't know the definite dates on that—I was not around there from then on until after the war—for a while during the war.

Q. You didn't come back until the conclusion of the recent World War?

A. It was in 1945 or 1946. There was some study made in 1945, and I think there was some more in 1946. I don't [173] know when the acquisition of that right of way was started.

Q. When did you say the south one was drawn?

A. This survey was started in February 1, 1939. That was the relocation of the Pacific Highway through the City of Eugene, which is known as the Sixth Street route. This map was made January, 1940, which is a sketch map showing the proposed

(Testimony of Loy W. Rowling.)

Direct Examination

By Mr. Davidson:

Q. What is your name?

A. Loy W. Rowling.

Q. What is your occupation, business?

A. Vice-President of the First National Bank of Eugene, Oregon.

Q. Does the corporation, the Twin Oaks Company keep its account at the First National Bank at Eugene? A. It does.

Q. Does the Twin Oaks Builders Supply Company keep its account at your bank? A. Yes.

Q. Are those accounts kept separately?

A. They are.

Q. Do you have with you a copy of the signature authorization card of the Twin Oaks Builders Supply Company? A [179] partnership?

A. I have a copy, with affidavit attached, signed by the president of our bank, testifying that this is a copy of the signature card.

Q. Are you familiar with the original card?

A. I am.

Q. Is that a copy of it (indicating)?

A. It is.

Mr. Davidson: I would like to have it marked for identification.

The Clerk: Petitioner's 36.

(The document referred to was marked as Petitioner's Exhibit No. 36 for identification.)

(Testimony of Loy W. Rowling.)

Q. (By Mr. Davidson): I hand you a document which has been marked as Petitioner's 36.

Will you state what that is?

A. A copy of the original signature card carried in our bank for the account of Twin Oaks Builders Supply Company.

Q. Is that signature card a part of the original bank records? A. It is.

Mr. Davidson: I offer it.

Mr. Pigg: Is the original card in the court room?

The Witness: No, it is not. [180]

Mr. Pigg: I don't have any objection.

The Court: It will be admitted.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 35, was received in evidence as Petitioner's Exhibit No. 35.)

Q. (By Mr. Davidson): Will you tell the court from this card, who was authorized to sign those checks of that company?

A. L. C. Sharpf, E. V. Scharpf, John J. Rogers and Corabelle Rogers.

Q. Any one of the four?

A. Any one of the four.

Q. Do you have in your possession the records of the First National Bank relating to borrowings by the Twin Oaks Company, a corporation?

A. I have a copy of the liability ledger sheet which was started under date of December, 1940,

(Testimony of Loy W. Rowling.)

and carried down until March, 1942; I did not bring any more with me.

Q. What company's borrowings does that reflect?

A. In the main, it reflects the corporation.

The Court: Raise your voice, please.

The Witness: In the main, it reflects the borrowings of the corporation.

Q. (By Mr. Davidson): Does it reflect any relationship of the partnership [181] to that loan, on later entries?

A. Yes, it was on the renewal date; it was also signed by the partnership.

Q. What was the renewal date?

A. The renewal date was July 1, 1941.

Q. Does that indicate that the corporation remains as the principle obligor? A. It does.

Q. And that the partnership was a co-signer or endorser? A. They were a co-signer.

Q. What is the custom with the bank where there is a corporation indebtedness assumed by the partnership?

A. I am not on the discount committee, but I think we always try to get all the signatures we can.

Q. In other words, if you have any relationship, you continue that?

A. Yes; and this partnership was perfectly willing to supply that.

(Testimony of Loy W. Rowling.)

Q. Does this ledger sheet reflect any new borrowings by the partnership?

The Court: The ledger sheet, is that the exhibit which has just been identified?

Mr. Davidson: No; he is just testifying from that. That is the document from which he is testifying.

Mr. Pigg: I object to the question, and ask that it [182] be identified, so we will know what he is talking about.

The Court: Unless it is identified, you don't know what he is talking about. The reporter's notes won't show what he is talking about.

Mr. Pigg: It should be identified as to what he is talking about.

Mr. Davidson: Will you read the question as it referred to the ledger sheet, Mr. Reporter? I think, Your Honor, I asked him if he had in his possession any of the bank records, and he said he had, and then I asked him what the record showed. I think that is competent testimony.

The Court: If it is shown as identified, I didn't get that.

Mr. Pigg: That only makes the document itself admissible.

The Court: The document should be first identified, so there would be some way of identifying his testimony. In other words, it will be unintelligible when you read the stenographer's transcript unless the document is identified.

(Testimony of B. A. Martin.)

route. The details, plans and estimates were worked up on this route and submitted to the Highway Engineer—to the Highway Commission.

Q. Well, it is a fact, is it not, that the acquisition, or the matter of putting through the highway as it finally was determined upon, involved a three-way contract between the State of Oregon, the County of Lane and the City of Eugene?

A. That is correct.

Q. And that such a contract was not entered into or concluded until about November of 1946?

A. I think that is correct.

Q. And that is the first time it was actually known, or it could be said that it was known that the highway was being put through so far as the public was concerned?

A. The date that you are giving me there, November 1946, I don't know whether that is the date or not, but it was in that year that the city and the county and the state entered into an agreement. This is a study that was made previous to that agreement. [174]

Q. This is merely a study. You are not familiar with the actual consummation of any agreements or contracts between the three parties I have mentioned?

A. Well, I have read the contract, yes.

Q. Do you know whether it is dated November 1946 or some other month in 1946?

A. I don't know which month?

(Testimony of B. A. Martin.)

Q. But it was 1946? A. Yes.

Q. You are sure it was 1946?

A. Well, I wouldn't even be so sure as to say it was 1946. I know it was after the war, sometime between the end of the war and 1947.

Q. Anyway, it was finally determined, whichever year it was, that the highways, as shown by this map and chart in Exhibit 35 were the ones to be used? A. The one that was finally adopted.

Q. That is correct?

A. The plan is not on this map. This was made in 1940. We are talking about 1941. We just came to the edge of this property here (indicating), and then we swung to take the highway here (indicating) at the millrace.

The Court: By "this property," what do you mean?

The Witness: The Twin Oaks property. I think the line comes right at the edge of the Twin Oaks property; that [175] would be the northerly or the Sixth Street boundary of the Twin Oaks property. We swing to the south down or up the millrace, and we acquired right-of-way on both sides of the millrace. There is a piece of property which belongs to the Twin Oaks along on the west side of the millrace, which was acquired by the State Highway Commission. I couldn't tell you exactly from this map here, because this is nothing more than a sketch map drawn to scale.

(Testimony of B. A. Martin.)

Q. (By Mr. Pigg): This map shows the actual through? A. No, it does not.

Q. It does not? A. No.

Q. Was the survey which you have been describing along a curve there (indicating)?

A. Right there is a 12-degree curve.

The Court: Let us not go into the detail of the highway.

Q. (By Mr. Pigg): What is the fact as to whether the highway, as it is definitely decided to be put through, does or does not cut through any portion of the property of the Twin Oaks Companys? A. Will you state that question again?

Mr. Pigg: Will you read it, Mr. Reporter? [176]

(Whereupon the last question was read aloud by the reporter as above recorded.)

A. I don't understand the question that you asked.

The Court: Does it go through any part of the Twin Oaks property, the way it is going to be built?

The Witness: Yes; I know they have acquired right-of-way from the Twin Oaks Company, and they have also eliminated a spur track leading to their plant.

Q. (By Mr. Pigg): The Twin Oaks Company, was, of course, paid for any property that was acquired by the State Highway Commission, was it not? A. Certainly, Mr. Pigg.

Mr. Pigg: That is all.

(Testimony of B. A. Martin.)

Redirect Examination

By Mr. Davidson:

Q. Was the location of this survey made known to the public at or about the time it was made?

A. Yes.

Q. Was there any protest?

A. I could not say.

Q. This was, however, made public?

A. That plan was made public.

Q. At or about the time the map was made?

A. Yes. [177]

Mr. Davidson: That is all.

Mr. Pigg: That's all.

The Court: You may stand aside.

(Witness excused.)

The Court: The Court will take a recess until two o'clock this afternoon.

(Whereupon, at 12:30 p.m., a recess was taken until 2:00 p.m. of the same day.) [178]

Afternoon Session, 2:00 p.m.

The Court: Call your next witness, Mr. Davidson.

Mr. Davidson: I will call Mr. Rowling.

Whereupon,

LOY W. ROWLING

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

(Testimony of Loy W. Rowling.)

Mr. Davidson: All right. I will have it marked for identification.

The Clerk: Petitioner's 37 for identification.

(The document referred to was marked as
Petitioner's Exhibit No. 37 for identification.)

Q. (By Mr. Davidson): I hand you herewith a document marked for identification as Petitioner's 37. Will you state what that is?

A. The liability ledger sheet of the Twin Oaks Company.

Q. When did it start?

A. It started in December, 1940, and has continued on here, up until March 24, 1942.

Q. What company's borrowings does it reflect?

A. Originally, it reflected the borrowings of the corporation.

Q. Does it show any relationship to the partnership in the borrowings?

A. Yes, it shows that the partnership signed the note.

Q. What is the custom of the bank where the partnership succeeds the corporation, where the corporation is still in existence?

A. It is customary to get both signatures to the notes.

Q. Does the ledger show any borrowings by the partnership, as such?

A. I don't believe this one does.

Mr. Davidson: We offer this in evidence.

Mr. Pigg: No objection.

(Testimony of Loy W. Rowling.)

The Court: It will be admitted in evidence as Petitioner's 37. [184]

(The document referred to, heretofore marked as Petitioner's Exhibit No. 37 for identification, was received in evidence as Petitioner's Exhibit No. 37.)

Q. (By Mr. Davidson): Mr. Rowling, I show you Petitioner's 21, which has been introduced in evidence as the borrowing authorization continued for the partners of the Twin Oaks Builders Supply Company, which you will note is dated in 1944. Will you state whether, to your knowledge, there was any previous authorization?

A. Yes, I think that is the first authorization we have for the partnership.

Q. To your knowledge, did the bank make any loans to the partnership prior to this time?

A. Not to my knowledge.

Q. Would it be customary for the bank to require authorization, in the years 1941 to 1943, under your then existing practice, where the partnership was the endorser on the note?

A. No.

Q. In your experience with the bank, have you had any experience as to interest rates on purchase contracts covering various kinds of property?

A. Well, I have been in the bank 31 years, and naturally I have gone through most of the departments; and it has been my observation that contracts of this nature are usually at [185] a lower

(Testimony of Loy W. Rowling.)

rate than the going bank interest rates.

Q. Is there any standard rate for such a contract? A. I don't know of any.

Mr. Davidson: That is all.

Cross-Examination

By Mr. Pigg:

Q. Mr. Rowling, I hand you again Petitioner's 37. Do I correctly understand that on this exhibit there appears the continuation of a loan existing by the bank to the corporation, the Twin Oaks Builders Supply Company, on December 31, 1940, that was later, thereafter, renewed or substituted for a loan by the partnership?

A. Renewal, yes.

Q. How much was that loan?

A. On December 31, 1940—\$20,250; January, 1941, a \$4000 payment, which reduced the loan to \$16,250 and that note was renewed in July, 1941, for \$16,250.

Q. And the obligor was the corporation?

A. Yes.

Q. Does that also show it was signed in the partnership's name, or in the name of the individuals?

A. It was signed in the partnership's name.

Q. By one of the partners?

A. I could not say as to that.

Q. Then you don't know who signed it? [186]

A. No.

Q. You don't know whether it was signed by either Mrs. Rogers or Mrs. Scharpf, do you?

(Testimony of Loy W. Rowling.)

A. There is nothing here to indicate who signed it.

Q. You don't know whether it was signed by Mr. Rogers or Mr. Scharpf? A. No, I don't.

Q. Isn't it customary under such circumstances and under the manner in which banking business is carried on and conducted, upon receipt of a notification similar to Petitioner's 21, which I hand you, that, as a matter of general practice, the bank would require signatures of any persons purporting to be partners under those notes?

A. Yes; although this corporation—although this note was originally the corporation's note, the additional signatures put on there simply as additional signatures or endorsers.

Q. You knew at the time the note was renewed that the corporation had transferred its current assets to the partnership? A. Yes.

Q. Were you familiar with the transactions, in general, or did you become familiar with it in connection with the renewal of the note?

A. I don't know how we became familiar with it, other [187] than that we had a letter from the company, January 1, 1941, stating it was to be a partnership.

Q. Is Exhibit 21 the letter that you referred to?

A. No, it is not. I have a letter in my file from Mr. Rogers. I don't seem to find it. I thought I had one here. I don't seem to locate it right now. We had a letter. I cannot find it. It was dated

(Testimony of Loy W. Rowling.)

January 15, 1942, signed by Mr. Rogers, "We hand you herewith the combined financial statement of the Twin Oaks Builders Supply Company."

Mr. Pigg: I move to strike that as not responsive.

Q. (By Mr. Pigg): Does that relate to the same subject matter as Petitioner's 21?

A. It relates in this way, that it gives us notice that there is also a partnership and a corporation.

Q. When was that, Mr. Rowling?

A. January, 1942.

Q. When did you first become aware, or when were you first put on notice there was a partnership?

A. In the early part of January, 1941.

The Court: Is there any exhibit in relation to that?

Mr. Davidson: Where is the signature card?

The Witness: That would be notice.

Mr. Davidson: The signature card on Petitioner's [188] 36 is dated January 2, 1941.

The Witness: I also had a letter, and I don't seem to be able to locate it.

Q. (By Mr. Pigg): Now, as an officer of the First National Bank—the Eugene branch of the First National Bank——

A. Not a branch.

Q. Is it a separate institution?

A. That is right.

Q. And being put on notice that the assets had been transferred, as they were in this case from the corporation to the former stockholders and their

(Testimony of Loy W. Rowling.)

husbands and wives, what is the practice as to whether or not the bank, in the conduct of its business, would have required the signatures of both the wives and their husbands on a renewal note?

A. What is the fact?

Q. Yes.

A. As I say, I am not a member of the loan committee; I think they considered it was a corporation loan, since there was a close affiliation between the two, and they had the partnership sign, too.

Q. Before January, 1941, you knew the corporation was carrying on the business of lumber and building supply?

A. The nature of the business before the partnership?

Q. That's right? [189]

A. That is correct.

Q. After January 1, 1941, you knew that the corporation was not doing it?

A. We apparently knew there was a change in the setup.

Q. And it was the husbands and wives to whom the current assets of the corporation had been transferred, who were carrying on the business?

A. We probably knew that the partnership was carrying on the business, but the corporation still owned the real estate.

Q. With respect to Exhibit 37, was that a secured or an unsecured loan?

A. An unsecured loan.

(Testimony of Loy W. Rowling.)

Q. An unsecured loan? A. Yes.

Q. Wouldn't that be regarded as a commercial loan, or otherwise?

A. The original note was probably regarded as a commercial loan.

Q. What was the difference as to how it was considered originally and when it was renewed in 1941?

A. Well, I suspect the bank had sufficient faith and confidence in the firm to continue it that way.

Q. By "the firm," you mean the individuals or the corporation? [190]

A. The whole picture.

Q. The whole setup? A. Yes.

Q. In other words, when the note was renewed, you were relying on the assets available and the earning capacity available of the business, as a whole; is that correct, as a unit?

A. The discount committee felt that the partnership should sign the note also; that is all they did.

Q. That would be the normal course of events?

A. That is right.

Q. Referring again to Exhibit No. 37, Mr. Rowling, what was the rate of interest on that loan?

A. It was six per cent up until July 14, 1941, and then it was five per cent.

Q. Do you know any reason why the interest rate, the prevailing interest rate, in Eugene in the early part of 1941, for commercial loans of that

(Testimony of Loy W. Rowling.)

type, should have been less than six per cent, as you charged in this case.

A. Well, competition regulates the interest rate a good deal.

Q. And with that competition, you charged six per cent at that time?

A. Yes, we were able to do that.

Q. And did your bank have notice as to the manner in which the partnership arrangement was made and the nature of [191] the assets, and any notes that were given in that transaction, if any?

A. At the time of the change?

Q. Yes.

A. I don't have any records to that effect. They may have had. There is nothing here that I can find to show it. It was the custom in the days before we were affiliated with the First National, to verify at the recorder's office in the County, to find out whether the assumed business name had been filed, but we never required it in our files until we became affiliated with the First National Bank of Portland.

Q. Assuming that in connection with the transaction in which the partnership was organized or set up in January, 1941, if there were current assets of the corporation, accounts receivable and cash, delivery equipment, and so forth, representing the value of those assets, and the excess of the value of those assets over the liabilities assumed by the arrangement amounted to \$89,000, and that unsecured

(Testimony of Loy W. Rowling.)

note was given by the partners of the corporation for the payment or liquidation of that note for a period of one year, would or would not the prevailing rate of interest, six per cent, or less than six per cent?

A. You mean the loan from the bank?

Q. Of the type I have just described?

A. Borrowing it from the bank? [192]

Q. Yes. A. It probably would have been.

Mr. Pigg: That's all.

Mr. Davidson: That's all.

The Court: You may stand aside.

(Witness excused.)

The Court: Call your next witness.

Mr. Davidson: Mrs. Mignon Carmichael.

Whereupon,

MIGNON CARMICHAEL

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Will you state your name?

A. Mignon Carmichael.

Q. What is your occupation?

A. I am bookkeeper for the Twin Oaks Builders Supply Company and the Twin Oaks Company.

Q. You keep the books both for the corporation and the partnership? A. Yes.

(Testimony of Mignon Carmichael.)

Q. Are you familiar with the character of those books? A. Yes. [193]

Q. Do you work on them right along?

A. Yes.

Q. Will you state if separate accounts are kept for the corporation and the partnership?

A. Yes.

The Court: How long have you been working there?

The Witness: Since August, 1943. I went in as assistant bookkeeper at that time.

Q. (By Mr. Davidson): Do the books show since what period they have been kept separately?

A. Since 1941.

Q. And have you, since you have been there—since what time in 1941?

A. January 2, I believe that would be.

Q. Do you do the banking for both corporations?

A. Yes; that is, I oversee it; I have girls working under me, and they take it to the bank for me, but I oversee it.

Q. Are they deposited in separate accounts?

A. Yes.

Q. Do the records show how long the separate accounts have been maintained?

Mr. Pigg: I submit the records, themselves, are the best evidence. [194]

Mr. Davidson: We have the ledger sheets.

Mr. Pigg: Are they in court?

(Testimony of Mignon Carmichael.)

The Court: I think we should shorten it, if possible.

Q. (By Mr. Davidson): Do the bank accounts show for what period they have been maintained separately?

A. Since January 2, 1941.

Q. What inter-company transactions are there between the corporation and the partnership?

The Court: As shown by the books.

Q. (By Mr. Davidson): As shown by the books of the company?

A. I don't know if I understand you exactly.

Q. Does the partnership make any payments to the corporation, as shown by the books?

A. They pay the rentals.

Q. Do the books show any payments by the corporation to the partnership?

A. They pay for the keeping of the books.

Q. How is that payment made?

A. Annually.

Q. How much annually? A. \$300.

Q. And do the books show that has been the regular payment [195] since the inception?

The Court: \$300 annually?

The Witness: Annually.

Mr. Davidson: You may cross-examine.

Cross-Examination

By Mr. Pigg:

Q. Is it the corporation that pays the partner-

(Testimony of Mignon Carmichael.)

ship \$300 or does the partnership pay the corporation?

A. The Corporation pays the partnership \$300 annually for keeping the books.

Q. For Bookkeeping service?

A. For my work and the auditing of the books at the end of the year.

Q. You came to the Twin Oaks Company, so far as your bookkeeping capacity was concerned, in August of 1943?

A. Yes; as assistant.

Mr. Pigg: That is all.

Redirect Examination

By Mr. Davidson:

Q. Just one more question. Have you handled the receipt books of any payments from the partnership to the corporation? A. Yes.

in the corporation's bank account? A. Yes.
Mr. Davidson.

Mr. Pigg: No That is all.

The Court: You questions.

may stand aside.

(Witness excused.)

The Court: Call the next witness.

Mr. Davidson: Your Honor, we have a few documents that we would like to offer in evidence. I would like to have this marked for identification (indicating).

The Clerk: Petitioner's 38.

(The document referred to was marked as Petitioner's Exhibit No. 38 for identification.)

Mr. Davidson: We offer as Petitioner's 38 the revenue agent's report, with transmittal letters addressed to Louis C. Scharpf and Eva M. Scharpf for the year 1943, showing deficiencies assessed against Mr. Scharpf and an over assessment for Mrs. Scharpf.

The Court: Who is it from?

Mr. Davidson: From Seth R. Stockton, revenue agent in charge.

Mr. Pigg: That is immaterial. It only shows a recommendation by the revenue agent in charge and is not a determination by the Commissioner.

Mr. Davidson: It is an official act of an agent of the government in charge of those things.

Mr. Pigg: It does not become an official act until [197] it is approved by the Commissioner.

The Court: What does it show?

Mr. Davidson: It contains all these reports, and shows that the revenue agent in charge is recommending that the status of Mrs. Scharpf as a partner be disallowed, and that the entire income of Mr. and Mrs. Scharpf from the partnership be taxed to Mr. Scharpf.

The Court: I don't think it would be necessarily binding on the Commissioner. I do know what probative force it would have. It will be admitted as Exhibit 38.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 38 for

identification was received in evidence as Petitioner's Exhibit No. 38.)

Mr. Pigg: I have no objection insofar as it is consistent with any determination that the Commissioner may have made.

Mr. Davidson: I would also like to have this marked for identification (indicating document).

The Clerk: Petitioner's 39.

(The document referred to was marked as Petitioner's Exhibit No. 39 for identification.)

Mr. Davidson: We offer the same type of exhibit for the year 1943 for Mr. and Mrs. Rogers.

Mr. Pigg: The same objection.

The Court: The same ruling; it will be received as Petitioner's 39.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 39 for identification, was received in evidence as Petitioner's Exhibit No. 39.)

(The document referred to was marked as Petitioner's Exhibit No. 40 for identification.)

Mr. Davidson: We offer the same type of report covering the Twin Oaks Builders Supply Company, a partnership, for the years 1942 and 1943, showing no assessment of income, but a reallocation between the partners.

Mr. Pigg: Same objection.

The Court: It will be admitted and marked as Petitioner's Exhibit 40.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 40 for identification, was received in evidence as Petitioner's Exhibit No. 40.)

Mr. Davidson: Will you mark this?

The Clerk: Petitioner's 41.

The Court: What is it?

Mr. Davidson: Petitioner's Exhibit 41 is a certificate of the Collector of Internal Revenue, showing payments of income tax of Louis C. Scharpf for the years 1943 and 1944. I offer that in evidence.

Mr. Pigg: No objection.

The Court: It will be admitted as Petitioner's 41. [199]

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 41.)

Mr. Davidson: I also have here a deficiency notice addressed to John J. Rogers for the years 1943 and 1944, which I would like to have marked for identification.

The Clerk: Petitioner's 42.

The Court: What is that, now?

Mr. Davidson: The deficiency notice addressed to Mr. John J. Rogers, for the years 1943 and 1944. I offer that in evidence.

Mr. Pigg: No objection.

The Court: It will be received and marked as Petitioner's 42.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 42.)

Mr. Davidson: And also the deficiency notice addressed to Louis C. Scharpf, covering the same years, 1943 and 1944.

The Clerk: Petitioner's 43.

(The document referred to was marked as Petitioner's Exhibit No. 43 for identification.)

Mr. Davidson: We offer Petitioner's 43, the deficiency notice addressed by the Respondent to Louis C. Scharpf covering the years 1943 and 1944.

Mr. Pigg: We object to it as immaterial. [200]

The Court: It will be received and marked as Petitioner's 43.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 43 for identification, was received in evidence as Petitioner's Exhibit No. 43.)

Mr. Davidson: I offer as Petitioner's 44, the certificate of the Collector of Internal Revenue showing payments of income tax by John J. Rogers for the years 1943 and 1944.

Mr. Pigg: No objection.

The Court: It will be received and marked as Petitioner's 44.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 44.)

Mr. Davidson: Your Honor, that completes the Petitioner's case, except that we had another witness on evaluations, Mr. Peterson of Eugene, and counsel for the Respondent has agreed to stipulate that, if called, Mr. Peterson would be qualified to testify and would testify that, in his opinion, a reasonable rental value of the Twin Oaks Property in Eugene at January 2, 1941, would be from \$185 to \$210 per month, and that he based that opinion upon a rental of sixty dollars for the concrete building, and rental of \$125 to \$150 for the balance of the property, and that otherwise on the direct examination and cross-examination, his testimony would [201] be the same as that of Mr. Rodman, who testified.

The Court: Is it stipulated by Respondent that the witness would so testify?

Mr. Pigg: Yes.

The Court: We will consider his testimony then, as though he were present?

Mr. Pigg: That is right; it may be so considered.

Mr. Davidson: The Petitioner rests.

The Court: The Respondent may proceed.

Mr. Pigg: Mr. Hyde.

Whereupon,

CLARENCE F. HYDE

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

(Testimony of Clarence F. Hyde.)

Direct Examination

By Mr. Pigg:

Q. Will you state your name?

A. Clarence F. Hyde.

Q. What is your business or occupation, Mr. Hyde?

A. I am a realtor and appraiser.

Q. Where?

A. In Eugene.

Q. Eugene, Oregon?

A. Yes. [202]

Q. How long have you been engaged in that business or profession there?

A. I have been an operator in the real estate business since 1920; I have been devoting a large portion of my time to appraising since 1933. At the present time, I am devoting about 30 per cent—about 80 per cent of my time to appraisal.

Q. Prior to your engaging in that business, did you pursue any collegiate or other courses of study to qualify you particularly or to better qualify you for that work?

A. I took a course of instruction with American Institute of Real Estate Appraisers, and have the designation of a member of the Appraisers' Society, that is, I am a member of the Society of Real Estate Appraisers.

Q. What collegiate degrees, if any, do you hold?

A. I have no collegiate degrees; I have three years of college work.

Q. Are you a member of any professional society?

A. The American Institute of Real Estate Ap-

(Testimony of Clarence F. Hyde.)

praisers; and the Society of Residential Appraisers.

Q. In your apprasial work and your brokerage work, as you have described it, is it necessary that you make examinations and investigations and studies of real estate property for the purpose of reaching a conclusion as to the fair market values of the properties at a given date? A. Yes.

Q. And that in such cases the fair market value is what you refer to as the value for sale?

A. Yes.

Q. Or income purposes?

A. Yes, that is one of the things that is arrived at.

Q. In arriving at a fair rental value for real estate, would the process for reaching a conclusion as to the fair rental value take into account the same factors and considerations?

A. The same factors are taken into consideration. The rentals of comparable properties and the depreciated values of the subject property and comparable properties as well.

Q. And would you proceed in that manner for the purpose of arriving at the fair rental value of a property—real property—commercial or business property—for purposes which contemplate a lease of property for a period of one year, or from year to year thereafter until notice by one or the other of the parties of termination, as of January 1, 1941?

A. Yes.

(Testimony of Clarence F. Hyde.)

Q. Are you familiar with the business properties or any other real properties owned by the Twin Oaks Company or the Twin Oaks Builders Supply Company of Eugene, Oregon, as of January 1, 1941?

A. You say, am I familiar with the properties which they owned as of that date? [204]

Q. Yes? A. Yes.

Q. Are you still familiar with them?

A. Yes.

Q. Do you have any general familiarity with, or did you have any familiarity with them prior to January 1, 1941?

A. As a customer of the store on some different occasions I have made some purchases of the company, and passing by there several times a week during a number of years, I became familiar with them.

Q. In that way you have gained a general knowledge, such as you have mentioned?

A. Yes.

Q. Now, are you familiar with the properties which either of the companies mentioned owned in Junction City and Cottage Grove, Oregon?

A. Yes, I am acquainted with those.

Q. Also as of January 1, 1941? A. Yes.

Q. Mr. Hyde, I hand you Petitioner's Exhibit 17, which is the lease agreement, or a copy of it, to which I referred a while ago. Have you been furnished with a copy of that lease heretofore?

(Testimony of Clarence F. Hyde.)

A. Yes.

Q. And this is the same as the one you have a copy of? [205]

A. Yes.

Q. Now, have you made an independent search or examination of the public records or any other recognized records for the purpose of ascertaining what properties were owned by the Twin Oaks Builders Supply Company as of January 1, 1941, or January 2, 1941?

A. Yes.

Q. Have you prepared a list or a chart of such properties?

A. I have.

Q. Do you have it with you?

A. Yes.

Q. Will you let me see the list or chart which you have there (indicating)?

A. Surely.

Mr. Pigg: I will ask that it be marked for identification as a Respondent Exhibit.

The Clerk: Respondent's Exhibit D.

(The document referred to was marked as Respondent's Exhibit D for identification.)

Q. (By Mr. Pigg): Mr. Hyde, I will return to you now the same group of papers which you handed me, which have now been marked for identification as Respondent's D. Can you designate or identify by page number in the chart which you have drawn or made showing the location of the Twin Oaks property or other [206] identification including the pictures, or otherwise?

A. Yes.

Q. Will you do so?

A. Well, the plat of the real property in Cottage Grove is on page 1; the picture of the building is on page 2.

(Testimony of Clarence F. Hyde.)

Q. Is that the Cottage Grove property?

A. That is Cottage Grove. And Junction City, the plat of the land is on page 5, and the pictures cover pages 6, 7 and 8. The main property on Eugene is on page 13, and the pictures on pages 14, 15, 16 and 17.

Q. And are there attached to the group of papers, now Exhibit D for identification, certified copies of deeds and conveyances relating to those particular properties? A. Yes, there is.

Mr. Pigg: We will also ask that this deed, this certified copy of a deed be marked for identification as Respondent's E.

(The document referred to was marked Respondent's Exhibit E for identification.)

The Court: Is that all attached to Respondent's D?

Mr. Pigg: That is right.

The Court: They are all under one cover?

Mr. Pigg: They are presently under one staple; and the next one, also a certified copy of a warranty deed. I will ask be marked as Respondent's F.

(The document referred to was marked Respondent's Exhibit F for identification.) [207]

The Court: Is there any objection to the introduction of these?

Mr. Davidson: There is no objection to the deeds. I assume they are what they purport to be, but I do

(Testimony of Clarence F. Hyde.)

object to the rest of the offer, and I am referring particularly to this group of papers and pictures.

The Court: He is not offering Respondent's D yet; that has just simply been identified.

Mr. Davidson: Yes, so I understand.

Mr. Pigg: And the next one I ask be marked as Exhibit G.

(The document referred to was marked as Respondent's Exhibit G for identification.)

Q. (By Mr. Pigg): Mr. Hyde, when were the photographs that you have identified in this exhibit for identification made, and by whom?

A. They were made by myself during the past ten days.

Q. To what extent, if you know, do the photographs that you have identified, insofar as buildings are concerned, disclose a picture of a building, or whatever it was, as it existed on January 1, 1941?

A. One of the pictures of the property at Sixth and High Streets shows a building back of which street there was constructed a building since that date. It is not very plain [208] in view of the building; but there was a building destroyed by fire in 1946, and a new building placed in front of it.

Q. Will you identify that by page number and by picture also?

A. It is shown on page 16; it is the frame building in the rear of the building which has the sign on it "Twin Oaks Builders Supply Company."

(Testimony of Clarence F. Hyde.)

Q. Are you familiar with the properties which you have described as they stood or existed on January 1, 1941? A. Yes.

Q. Now have you made a study and analysis of the pertinent facts in this case for the purpose of arriving at an opinion as to the fair rental value of these properties that you have described as of January 1, 1941?

A. Well, the only exception is one property that I didn't make a very complete investigation of, and that was the Cottage Grove warehouse property, which was locked; and I did not see the inside of it. But I did make inquiries of the tenants of what it was like on the inside.

Q. I used the phrase of "fair market" or "rental" value. What did you understand by those words?

A. A fair market value is the amount which a willing purchaser is willing to pay for a given amount of property or a certain amount of property, with a willing seller who is willing to sell, both of full knowledge of all conditions [209] applicable to the property, and neither the buyer having to buy or the seller having to sell.

Q. For the purpose of arriving at a fair rental value of a given property at a basic or given date, the same considerations or factors are true, are they not?

A. The same factors are considered.

Q. Based on your study and survey, and in the

(Testimony of Clarence F. Hyde.)

light of the experience that you have related, have you arrived at an opinion as to the fair market value of these properties—fair rental value of the properties as of January 1, 1941? A. Yes, sir.

Q. Will you state what that fair rental value is?

A. \$6700.

Q. What is that? A. \$6700.

The Court: What year?

The Witness: As of January 1, 1941.

The Court: For what period?

The Witness: For one year; for the calendar year 1941.

Q. (By Mr. Pigg): Does that include the real properties only, or the real property and furniture and fixtures?

A. This includes all the real property that they own, but not the fixtures or furniture; and it also includes the [210] building in another part of the city which was owned, and on which I think they did not own the land.

Q. Now, Mr. Hyde, will you explain in your own words just how you arrived at that value?

A. The Cottage Grove property consists of tracts of land approximately 170 feet in length and 105 feet in depth, and another vacant lot which is facing Ninth Street, which was the Pacific Highway, with a 45 foot frontage, with approximately 100 feet in depth; and there is a warehouse building 85 by 88. This warehouse building has a full basement, and one story above the basement. Upon inquiry *I informed*

(Testimony of Clarence F. Hyde.)

that this was a strong and substantial building, and about one half of it had a concrete floor. The fact that that building was rented, according to the information I received, during the years 1941—very little of it in 1940—and during the year 1941, 1942, 1943, 1944, and during that period the average rent amounted to, according to the figures I was furnished, at the courtesy of Mr. Rogers, was \$1054. So I estimated the fair rental value for the property for the year 1941 at \$950.

For the Junction City property, I made considerable inquiry as to other rentals in Junction City, and considered the property which the Twin Oaks Builders Supply Company was renting—the property that they are renting is on Sixth and Front Streets—that is a building with 50 foot frontage [211] and 74 feet in depth. It is a one-story store building. Now, immediately adjoining that property, on land which the company does not own, there was constructed upon it a hollow tile building. This hollow tile building is 50 feet wide and adjoins the building which they own and has a depth of 34 feet with 15 feet height. There is a string of windows across the top of the building, at both the east and west ends, about 30 inches wide on each side. That building has a cement floor, with the exception of two spaces for drivers of 27 feet each for cars. And in that building—that is a property that has 700 square feet of floor space. Considering the cost of that property as of the present time, and the value

(Testimony of Clarence F. Hyde.)

as of 1941, which is 56.4 per cent of the cost as of April 1, 1941, and allowing 25 per cent depreciation, there would be a value as of the present time of \$2200 for that building. That building adjoins the building which they are now using, which they are renting, and has a ground floor space of over fifty per cent of the store space; in addition to that, over 700 square feet of balcony space. I estimated the rental value of that to be, what they are paying for the store property, and the store property is comparable with other land—I considered that to be \$25 per month, or \$300 per year.

Immediately to the north of that, *there two* and three fourths city lots; the lots are 50 x 100 each, with [212] 137½ feet of paving on Front Street, and 100 feet on Seventh Street; that tract of land is enclosed by a six-foot woven wire fence, with three barbed wires above, and is improved with a building for the storage of lumber. The main building is a hollow tile at each end with an average height of ten feet, 40 x 90, with a total 3800 square feet. There is another storage shed 20 x 68 with an average height of ten feet, and a total 5160 square feet.

I considered that that property, being used to its highest use for the benefit of the lumber company, and in taking into consideration the comparable rents at Junction City I estimated the rental value of that property to be \$25 per year—\$25 per month—or a total rental for the Junction City property altogether of \$600 per year.

(Testimony of Clarence F. Hyde.)

There is one property in the City of Eugene which was located out on Charleston Street, on lot 3, block 5 of Skinner's addition, on land which is owned by the Oregon Electric Railway Company, which is leased land. The improvements in that building or on that tract of land, that belongs to the Twin Oaks Company, and consists of a building, a concrete building 32 x 100. The west side of the building is concrete, but the east side of the building is open, and it has a tar roof. Immediately adjoining that is a frame building which is 32 feet at one end and 8 feet at the other end; the difference in width being due to the railroad spur that runs into it. [213] That building is 40 feet in length. In addition to that improvement, there are four open coal bins, 25 feet wide, 40 feet in length, 6 feet high. The assessed value for tax purposes for that improvement is \$750 and the tax during 1941 was \$31.11. Upon inquiry, I found that that property was sold in January, 1948, and is now being operated by other ownership.

During the years 1941 to 1944, it was operated as a fuel business by the Twin Oaks Company. In consideration of that property with other rentals I estimated the rental value of that improvement to be \$25 per month, or \$300 per year.

I was informed that the property was sold for \$3500, but that was not verified.

Now, the main properties which heretofore have been discussed in particular have been the properties on which the main business of the company

(Testimony of Clarence F. Hyde.)

has been conducted, and the property is owned by the corporation, and was owned on January 1, 1941. That consists of lots: No. 2, the east 40 feet of lot No. 3, lot 6, and the north 5 feet of lot 7; all of plot 18; in the original plot of Lane County, Oregon.

On Lot No. 2, at the corner of Sixth Street and High Street is a heavily constructed cement building 34x50 feet, with a full basement. There are two stories above the basement, with a ceiling height of approximately 8 feet. This building is improved with a freight elevator. I did not [214] learn or verify the capacity of this elevator, but from my observation I am of the opinion that it was one and one-half tons, or in excess of that amount. This cement building has an advantage in being contiguous to other property owned by the company, so far as trackage is concerned, and is quite comparable to a building located Fourth and Lincoln Streets operated by the Eugene Mill Supply Company. That property of the Eugene Mill Supply Company was leased in 1941 for \$235 per month. That property is now renting at \$400 per month. That building is a warehouse property with a space for one car on the railroad spur. The rent of \$235 is less than the owner received in 1940; at that time it rented for \$275. That means an average rental of 17c per square foot. On that basis, for this concrete building, 17c per square foot for the storage space available in the building, it would amount to \$867, which I would consider as the rental value of that property

(Testimony of Clarence F. Hyde.)

for the calendar year. Now, this cement building, as I already stated, has a full cement basement and two stories. The cost of that building as of the present date and for the two stories is, in my opinion, \$4.24 per square foot. And the construction cost at this date for the basement \$2.68 per square foot, or a reconstruction cost at the present time of \$1.972. The current costs of 1941 were 56.4 per cent of the 1948 costs, which would reduce that building to the value of the building as of January 1, 1941, to about \$10,700. [215]

I estimated the depreciation on that building from that date of 30 per cent, as a lawfully depreciated value of a two-story basement and building, \$7490; and the depreciated value of the elevator as of that date was \$1279. Therefore there would be a total depreciated value of that equipment of \$769 to that building on the basis of the depreciated value of the improvements; and, also, in comparing it with the rent of like property, I based the rent at \$867 per year.

Now, immediately adjoining this cement building was a storage shed which was approximately—the storage shed was approximately 40x95. That building was lost by fire in 1945 or 1946 but was replaced with a new building in 1946. Mr. Rogers also informed that the fire loss on that building was \$7422. Now, if we were going to use the rule of thumb of \$10 per month for each \$1000, assuming it was worth what I have indicated, that would result in a rent

(Testimony of Clarence F. Hyde.)

of \$888 per year. But I think that might be excessive; so, for the purpose of this appraisal, I estimated the value of that building for storage space to be on the basis of one cent per square foot per month, or \$38 per month, with an annual rental of \$456.

Now, the main building of the Twin Oaks Company covers the west 145 feet of lot 6 and the north 5 feet of lot 7. So that that building has 85 foot frontage on High Street which is the main thoroughfare of that trade area, with a depth of 145 feet, having a railroad spur which is on [216] the property owned by the Twin Oaks Company. The west 30 feet of this building is used for an office and a retail store, and the east 115 feet is used for storage. So, I consider those two sections of the building separately. The 30 foot wide by 80 feet on the street is the store property, and has an area of 2550 square feet. Taking into consideration the rental of some other stores, which have narrower frontages in somewhat similar locations, for instance, the Maytag washing machine store or the Singer sewing machine store, or the Hub clothing store which have 20 foot frontage and 80 feet in depth—they were paying from 5 to 6 cents per square foot for rental, where they had the twenty foot frontage of store space.

In appraisal work, it is generally pretty well conceded that the front 30 feet of a store has a rental value of 54 per cent of the value of the store building which is 80 feet in depth; therefore I have as-

(Testimony of Clarence F. Hyde.)

signed in my opinion, that this property with an 85 foot frontage and a 30 foot depth at a rental value at that time 5 cents a square foot, or \$127.50 per month or an annual rental of \$1530.

Now, the storage part in connection with that same building, 85x115, has a minimum height of 20 feet and an average height of probably 22½ feet, and covers an area of 9775 square feet. There is one section of that, in the northwest corner, which is 30x30—that is a building which is enclosed, which is a room by itself, and is used for the [217] storage of small equipment, such things as hammers, hammer handles, and articles of that kind.

On the south side of the storage building there are two platforms, and adjoining them each is a space set off by partitions for the storage of building materials, and is used for the storage of lumber, because of its height and lumber can stand on end. Approximately one half of this building, of this 5775 square foot of building, has a concrete floor. For comparable purposes, the Northwest Flax Products Company owns——

The Court: I don't think we need to go into what these other people own. Let us not go too far afield.

The Witness: Without going into comparable properties, I estimated the rental value of this storage space to be at 8 cents per square foot, 8 cents per square foot per year, or \$1760.

Now, in addition to that space, the company owned on January 1, 1941, open land used for the storage

(Testimony of Clarence F. Hyde.)

of building materials, 8740 square feet, besides the railroad trackage, and I considered the value of that as comparable to the McCormack property which was bought by them for that same purpose, and I assumed the rental value of that as \$240 per year. I did not appraise the personal property, but in summing up the real property in Eugene, on High Street, the main plant has an assessed value, or did have in 1941 of \$6355. And I assumed the rental value of the entire property owned by the company [218] in 1941 as having a rental value of \$6700.

Q. Are you finished?

A. Yes, unless you want some more detail.

Q. Can you state briefly the nature of the principal appraisal work in which you were engaged, or in which you have engaged for governmental agencies or state agencies?

A. I did the appraising for the First National Bank, the United States National Bank at Eugene, and at Springfield, at Cottage Grove, and had conferences in connection with the government-insured G.I. loans, and have done some work for the United States National Bank, for the Bank itself, and I did appraising for Veterans Department of the State of Oregon on their loans that they are making to soldiers, which covers residential, farm and business property. The same thing is true on government loans. I have made appraisals for the California Insurance Commissioner of the largest pri-

(Testimony of Clarence F. Hyde.)

vate-owned property in Eugene, on which the insurance companies had liens. I have made appraisals for E. E. McKeen of the Connecticut Mutual Life Insurance Company, and for the Kaufman Mortgage Company. I have done considerable work for the Oregon State Highway Department on condemnation proceedings.

Q. Are you familiar with the Long-Bell properties in Eugene, used by the Long-Bell Company for their lumber yard or business?

A. Yes, I am familiar with that. [219]

Q. To what extent, if at all, do the Long-Bell Properties compare as a business facility with that of the Twin Oaks Company in Eugene?

A. In many ways they are very similar. They both have railroad trackage on the spur; they both have storage space. The Long-Bell lumber company facility is not quite as large, and it does not have quite the area. However, there are two differences that I think are material. I just described this two-story cement building which was owned by the Twin Oaks Company, and the Long-Bell company does not have such a building as that; and I also described the Twin Oaks Company as having a store and office room, on this 85 foot frontage on Main Street, and on High Street. The Long-Bell Company has a frontage for their office of 34 feet. In my judgment, the store facilities of the Twin Oaks Company are superior to the store facilities of the Long-Bell Company. I considered the rentals paid by the Long-Bell Company of \$300 per month. Mr. Sweet their lease

(Testimony of Clarence F. Hyde.)

was \$300 per month, and he didn't know whether *that* 1943 or 1942, but as of January 1, 1943, and being adjusted to January 1, 1941, on the basis of construction costs, it would be 90 per cent of that amount, or a monthly rent of \$270, or an annual rental \$3240.

Q. Are you familiar with the so-called Orem properties that are now owned by the Twin Oaks property?

A. I am familiar with it by observation, from outside [220] appearance.

Q. That is what I mean. I hand you Respondent's C, and ask you if that relates to the Orem properties, as being a deed of conveyance, or a certified copy?

A. That is a certified copy of the deed of conveyance.

Q. I hand you Respondent's I for identification. Does that have any relationship to the Orem property?

A. Yes, that is the building on the Orem property.

Q. Is that a residence?

A. That is a residence.

Q. This is the building that is on the land covered by Exhibit C for identification?

A. That is right.

Q. Now, both of those Exhibits, C and I for identification—speak what you know, if anything, about the relationship of those properties to the highway that is now going to be put through the City of Eu-

(Testimony of Clarence F. Hyde.)

gene here or adjacent to the properties of the Twin Oaks Company.

A. Well, this is the building (indicating); this is the property. As stated this morning, this is the property which was being condemned or had been purchased by the State Highway Department for the new highway.

Q. You are referring to Mr. Martin's testimony?

A. Yes.

Q. Is that the property which he mentioned as having [221] been acquired by the State Highway Commission?

A. Yes.

Q. From the Twin Oaks Company.

A. That is right.

Q. Then, what is the fact, Mr. Hyde, as to whether the highway that is to be built and re-routed in Eugene, as it is now known and contracted for as to whether it affects or touches or will improve the actual business property of the Twin Oaks Company?

A. Well, it does not touch the business property, but by agreement with the State Highway Department and the City of Eugene, the railroad spur which serves the Twin Oaks Company is to be disposed of. The Twin Oaks Company will lose the use of that railroad spur.

Q. If and when the new highway is put through?

A. That is right.

Q. Did you take that circumstance into account in arriving at the fair rental value to which you have testified?

(Testimony of Clarence F. Hyde.)

A. I considered the fair rental value of the properties on the basis of comparable rentals, and so far as the railroad spur is concerned, I considered just the depreciated value of the spur itself, that is, the cost of construction less depreciation.

I don't know whether you care for this additional information but, in my opinion, the main building of the [222] company, as of January 1, 1941, that is the main operation property on High Street, in Block 18—I estimated the depreciated value of the improvement as of January 1, 1941, at \$30,100; the value of the land at \$12,000; and the total rental of that particular parcel of property as \$4850.

Q. So far as your description of the property is concerned, as you have related that, particularly the improvements, are you speaking as of January 1, 1941, or as of some other date, or substantially that date?

A. January 1, 1941. I adjusted everything to that date.

Mr. Pigg: You may cross-examine.

Cross-Examination

Q. (By Mr. Davidson): What was the relative rate of rental increases from the beginning of 1941 to the beginning of 1942, in your opinion? The business rentals?

A. The Business rental increases were very slight during that time; possibly around 5 per cent.

Q. How much would you say from the beginning of 1942 to the beginning of 1943?

(Testimony of Clarence F. Hyde.)

A. It would be about 10 per cent; the same advance, or about a 5 per cent advance.

Q. How much would you say from the first of 1943 to the first of 1944? [223]

A. About a 10 per cent advance.

Q. And from the first of 1944 to the first of 1945—in Eugene, I mean?

A. Well, it made quite a good deal of difference in the types of rental property. Along in that period of time, as a result of scarcity, some leases ran out and there was bidding for leases; therefore there were some very material increases in that period of time. I don't think there was any stable price on any regular basis.

Q. Well, in your opinion, was this property being occupied at its highest and best use?

A. Yes, I think it was.

Q. Let us go the Cottage Grove property. Mr. Rogers gave you a statement of the rentals there?

A. Yes.

Q. And the rentals for 1937 were what?

A. Zero.

Q. 1938 they were zero too?

A. As I understand it.

Q. 1939 were zero?

A. So I understand.

Q. And the rentals for 1940 were \$516, and then we come up to 1940, and you say, based on your experience, that the rental should be \$950 a year?

A. That's right. [224]

(Testimony of Clarence F. Hyde.)

Q. Notwithstanding the fact that for three years they had nothing, and one year they had been able to rent for \$516?

A. Yes, because 1941 came along and conditions were on the upgrade.

Q. In the following year it was \$783 for the year, 1941? A. Yes.

Q. In other words, that is different in practice than in theory?

A. When I said 5 per cent, I was talking about properties that are rented as entire entities, as going concerns are rented on the basis, or their fair rental value is based on the highest and best use. This property was just starting to be used for a warehouse and, according to the information I got from the Pontiac agency, there was no person in charge of the property, and the rentals that they got—compared with that use—would depend upon the number of cars that they would put in there; and they were also paying some rent for the use of the car lot.

Q. I am asking you now if the estimate of \$950 is or is not based on the rental experience at Cottage Grove as of January 1941?

A. Adjusting that back over this period of time, the storage rents have increased. It is reasonable to expect that the rental for that period of time should be that much money.

Q. In other words, you think it is reasonable to expect [225] that as of January 1, 1941, a building from which they had received nothing for three

(Testimony of Clarence F. Hyde.)

years, and \$516 in one year, that they should receive for it during that year \$950?

A. Yes, because of the increased development and the increase in the lumber business in Cottage Grove, and I think it was reasonable to believe there would be additional use for storage purposes; and that is the thing that actually happened.

Q. Isn't that rather hindsight at this time?

A. I don't think so.

Q. You think that a person who had not gotten that much, including the following year, nevertheless, as an estimate, you figure that he should have gotten that much?

A. With the increased business conditions in Cottage Grove.

Q. We are talking about January 1, 1941?

A. That is right.

Q. Are you familiar with the conditions of the Junction City property as they were on January 1, 1941?

A. I have traveled past that property; I was not inside of that continually, but I had a familiarity to this extent; I did discuss the property with Senator Gibson, who is in the automobile business across the street, and has been for many years, and he informed me he was paying \$100 a month for his rental, and Mrs. Williams, who owned the [226] building, confirmed that; and Mr. Hanson, who was the manager of the Twin Oaks Company, told me that the

(Testimony of Clarence F. Hyde.)

property there was the same as it had been since he went there 12 years ago.

Q. But do you know that the main building is not owned by the Twin Oaks Company?

A. Yes, I know that.

Q. Do you know what rent they were paying in 1941?

A. Mr. Hanson—not Mr. Hanson but Mr. Gibson, and a man who rents a part of the building said that they were paying \$50 a month.

Q. Is that what you used as your basis?

A. I considered that: I considered the other rentals across the street from that which Mr. Gibson is paying \$100 for, and a 25 foot store building across the street which paid \$25 in 1941, and another 25 foot store in the same building which was rented for \$25.

Q. If you were trying to rent to strangers for the highest and best use, you would try to rent the property to some other material industry, building material industry?

A. That is the highest and best use, yes.

Q. You think that we would get a willing tenant who would be willing to pay, and a willing landlord who would be willing to rent, at that rate?

A. Yes.

Q. You think it could be rented for that? [227]

A. Yes.

Q. Considering the earning that the corporation

(Testimony of Clarence F. Hyde.)

has made, did you consider that as an indication of the rental possibilities?

A. Where comparable properties are being rented, and from what other people are paying, and the values of such properties, we would determine more the fair rental values than the earnings of the company. That is the reason I did not use the basis of business income or earnings.

Q. If you were renting a corner store down on the corner of High Street, wouldn't you base the rental value of that store on the basis of the earnings of the person occupying it for the highest and best use?

A. On the basis of what other comparable properties would rent for.

Q. That is, other comparable companies in the same business, what they were earning?

A. What they were paying for rent.

Q. Isn't it true that they are compelled, under economic circumstances, to pay on the basis of what they earn?

A. Not always.

Q. Let us put it this way: can they afford to take a definite loss where the rent is more than the net income to pay the rent?

A. Any person cannot pay more rent than he takes in, [228] because eventually he will go out of business; and when he goes out of business, someone else who is more competent in operating the business steps in and is able to pay the rent.

(Testimony of Clarence F. Hyde.)

Q. Do you consider Mr. Scharpf and Mr. Rogers competent?

A. I haven't seen any information on their financial statements, but it would be my judgment that they are very competent men. From the statement of the earnings of the company during the past few years, I think it verifies that.

Q. Let us put it this way; suppose the company owned the property and paid no rental, and had no earnings in 1934; \$627 in 1935; \$2344 in 1936; \$2173 in 1937; a loss of \$511.65 in 1938; a gain of \$2315.38 in 1939; a gain of \$6036.35 the next year; do you think that company could afford to pay \$6700 rent for that property?

A. There are lots of times when people own property that *there* business is up and down, and the owners of the property are not always, or, rather, do not always run their rents up and down according to the earnings of the individuals that are in there.

Q. Let us take it another way. Let us assume the business had earned but a \$1100 a year average for the past 20 years. Could they afford to pay \$6700 a year rent?

A. They had a capital investment in there as long as they owned the property; their investment in the property was [229] the equivalent of paying rent.

Q. Do you know what the capital investment in the property was?

A. I don't know what the capital investment in the property was, but I do know that values have in-

(Testimony of Clarence F. Hyde.)

creased, and as values have increased, properties have become worth more.

Q. If we use capital on the investment in the property, we would get a lower net result than we have now. So that doesn't do any good. Mr. Hyde, you stated that the Twin Oaks property was more valuable than the Long-Bell property, because of the fact that it possibly had a greater frontage on High Street. Just what total frontage on High Street does the Long-Bell company have?

A. The Long-Bell company extends from—they have a total frontage of 324 feet, but there is a part of that frontage which extends up next to the railroad track where there is a railroad crossing, which has no value so far as frontage is concerned; and the frontage of the store is only 34 feet.

Q. That is the office part?

A. That is right.

Q. But they have a complete building frontage that is greater than the Twin Oaks, or was in 1941?

A. Yes, they have, put the part that is enclosed does not add any more to its value. But they do have, according to Mr. Martin, who testified this afternoon, a smaller area and [230] I judge that to be true according to the curves that come into Fifth Street.

Q. Did you take into consideration the fact that they did not own the McCormack tract in 1941?

A. Yes.

Q. And that fact cuts down their frontage on High Street?

(Testimony of Clarence F. Hyde.)

A. Yes, the additional land that I placed the additional value of \$20 a month on, was the land not covered by improvements; it was approximately the same area as the McCormack land. The McCormack land amounted to 8940 square feet, if I remember correctly, and the other land was a little over 8700 square feet.

Q. Are you familiar with the Kreml Bakery property? A. Yes.

Q. Will you describe that?

A. That is a frame building, with 75 feet frontage, and extends east and west a distance of 145 feet. It is a very lightly constructed frame building. The exterior is wood lath, and it has stucco on it, and, as a result of weather, rain, getting wet and drying out, that stucco is breaking and cracking and becoming pretty badly broken.

Q. How will the land area in that building compare with the main Eugene property of Twin Oaks?

A. The area of that property is 75x145, and the area [231] of the Twin Oaks—of their store building and the shed and the storage space and the buildings back—is 85x145, and, in addition to that, they have a concrete or cement building 34x50, two full stories and a basement, and a building which was destroyed by fire, with approximately 40x95 dimensions. I have not figured it on a percentage basis, but the area which is covered by the Twin Oaks Company buildings is very much in excess of that.

Q. It sounds like it is about twice as much?

(Testimony of Clarence F. Hyde.)

A. Yes, twice as much and superior construction. The Kreml Bakery, that is a two-story building. I have not been on the inside of that building, except on the first floor; I don't know whether there is anything upstairs or not. At the present time a part of that building is being rented by the Twin Oaks Company, and a part of it is being rented by a produce company which has some refrigeration in it.

Q. Do you know that that building was being actively offered for sale in 1939 and 1940?

A. I was told by Mr. Rogers that the building had been offered for sale at one time for \$6000, and I also learned it sold at a later date at a much higher figure.

Q. As I understand you, in considering the rental values of Eugene property, you gave no effect to any assumed or supposed imminence of highway construction through the property? [232]

A. No, I did not consider that as a hazard to the property, because I made an investigation on that, and as a result of my investigation, I found that in November 1946 the City of Eugene and Lane County and the state had entered into an agreement that the spur was to be done away with, and that the highway was not to touch the Twin Oaks property.

Q. Now, Mr. Hyde, this agreement of November 1946 would not have much effect on the highway imminence January 1, 1941, would it?

A. No; but at that time, so far as highway construction was concerned, the Oregon State Highway Engineers were surveying in several areas. They

(Testimony of Clarence F. Hyde.)

were surveying through this subject property; they were also making surveys to eliminate Eugene and by-pass the city entirely; there was no certainty that a highway would be put through there.

Q. You heard Mr. Martin testify this morning that he was the locating engineer of that route, and that he had recommended that route to the Oregon Highway Commission, and that that was the status upon January 1, 1941; didn't you?

A. I heard him say that he made the survey and submitted it to the highway department. I didn't hear him state what his recommendations were. I do know this, that Mr. J. M. Devers told me that prior to 1946 everything was just a matter of surveys and talk.

Q. Were you living in Eugene at the time? [233]

A. Yes.

Q. Do you know whether there were any meetings or remonstrances against the proposed locations?

A. I know that some of the business men who would be affected by the highway, by any change in the highway going through their property, or in front of their property, did make a remonstrance.

Q. In other words, they were concerned about it?

A. Yes; they didn't want the highway to go through their property.

Q. Going back to Junction City, do you know that the hollow tile building was built after January 1, 1941?

A. No, I don't.

(Testimony of Clarence F. Hyde.)

Q. Did anybody tell you about that?

A. No. Mr. Hanson, the manager said it was built prior to 1941. He said the hollow tile building was constructed on land that the company did not own, but he said that there had been no change in that since he had been there.

Mr. Davidson: We will have to clear that up with another witness.

The Witness: There is chance for an error.

Mr. Davidson: That is all.

Redirect Examination .

By Mr. Pigg:

(The document referred to was marked as Respondent's Exhibit J for identification.)

Q. I hand you Respondent's J for identification. You were asked by Mr. Davidson, Mr. Hyde, concerning the possibility of that property being offered, or the fact that that piece of property was being actively offered in 1939 or 1940. Does that refer to the property that Mr. Davidson spoke of (indicating document)? A. Yes, it does.

Q. Does it also refer to the same property that Mr. Rogers spoke to you of? A. It does.

Q. Is that also the property, which, I believe you said, Mr. Rogers had been offered—just what did he say with respect to that?

The Court: That is going over the same thing again. What materiality does it have?

Mr. Pigg: It has this materiality; it shows that

(Testimony of Clarence F. Hyde.)

this was a piece of property on which they rely as comparable property, as——

The Court: I don't think we want to go into the details of what that property is. I think we have gone pretty far afield already.

Mr. Pigg: That's all.

The Court: You may stand aside.

(Witness excused.)

The Court: We will take a five minute recess.

(Whereupon a five minute recess was taken.)

Mr. Pigg: I would like to recall Mr. Hyde to the stand.

Whereupon,

CLARENCE F. HYDE

recalled as a witness for and on behalf of the Respondent, having been previously sworn, was further examined and testified as follows:

Further Redirect Examination

By Mr. Pigg:

Q. Mr. Hyde, will you remove from Respondent's D the pages which you identified, the plats that you had drawn and the pictures that you identified?

A. Yes.

Q. These pages numbered 1, 2, 5, 6, 7, 8, 9, 13, 14, 15, 16 and 17 are the same pages that you identified in your direct examination in Respondent's D?

A. That is right.

(Testimony of Clarence F. Hyde.)

Mr. Pigg: If Your Honor please, if I can offer them as a group——

The Court: Is there any objection to this evidence?

Mr. Davidson: I don't know what it is. Yes, there will be objections.

The Court: All right, make the objection, and we will determine that now. [236]

Mr. Davidson: We object to the introduction of the photographs made in 1948, which do not purport to show the condition of the occupancy of the building in January 1941, at the time he testified about: they are simply stated to be photographs to be taken in the last ten days by the witness, and therefore are irrelevant to the question involved.

Mr. Pigg: The witness stated that his testimony related to these properties as they existed in January 1941.

Mr. Davidson: We admit he testified to that, but the photographs do not so relate the testimony.

The Court: I believe I will sustain the objection. There are one or two additional buildings shown up in here, and one building was burned and so forth. I think it is just encumbering the record. You may stand aside.

(Witness excused.)

Mr. Pigg: Your Honor, let the record show that the only document that Mr. Hyde is taking with him is Respondent's D for identification, which I will not offer in evidence.

The Court: All right. Call your next witness.

Mr. Pigg: Mr. Rugh.

Whereupon,

LOYALL R. RUGH

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows: [237]

Direct Examination

By Mr. Pigg:

Q. Will you state your name?

A. Loyall R. Rugh.

Q. Mr. Rugh, I want to hurry through this as fast as possible. What is your business or occupation?

A. Real estate.

Q. Real estate brokerage or what?

A. Real estate broker, and handling all types of city and country property, appraising and making loans, and so forth.

Q. You mean business properties, commercial properties, and so on?

A. Yes.

Q. Where are you engaged in that business, Mr. Rugh?

A. Eugene, Oregon.

Q. For how long have you been engaged in business there?

A. 38 years.

Q. In the course of the conduct of your business, as you have described it, is it necessary, or do you have occasion to place a value or determine the fair market value of properties for the purpose of sale or income?

A. Yes.

Q. And for the purpose of determining the fair

(Testimony of Loyall R. Rugh.)

rental value of the properties? A. Yes. [238]

Q. And have you made such appraisals for any government or state agency? A. Yes.

Q. Will you just state briefly what those appraisals have covered?

A. Well, I have been called in three different times in the last year and a half—in the last less than a year—to make appraisals for the State Highway Commission on properties along the highway through Eugene. There have been about eight or nine properties that I have appraised, and I have appraised two properties for private individuals; one was appraised for the owner and so to the Highway Commission, and another one that I appraised for a private company, which they sold to the Highway Commission. In other words, I sold one and they sold one.

Q. Are you familiar with the real properties that were owned by the Twin Oaks Company, or the Twin Oaks Builders Supply Company as of January 1, 1941? A. Yes.

Q. Have you made an independent examination and search of the public or other recognized concerns for title for real properties? A. Yes.

Q. For that purpose? A. Yes. [239]

Q. And do you have a general familiarity with the class and character of the fixtures and office furniture of the Twin Oaks Company as of that time?

A. Yes, I have.

(Testimony of Loyall R. Rugh.)

Q. Were you present during the period that Mr. Hyde just gave his testimony? A. Yes.

Q. You heard his description of the properties of the Twin Oaks Company? A. Yes.

Q. Are they the same properties that you found to be owned by the company at this time?

A. They are in all particulars, except the High Street property; that was listed as personal property, and I did not find that, and therefore it is not in my testimony; but nevertheless I would testify as to the other property the same as he did.

Q. In other words, your testimony would not cover the High Street property?

A. Not the High Street, on leased land.

Q. Just what did that involve?

A. That involved \$300 a year rental, I think he testified; but I do not have that.

Q. Now, have you made a study and examination of the pertinent facts in this case for the purpose of arriving at [240] the fair rental value of the properties in question, that is, only the rental value of them as of January 1, 1941? A. Yes.

Q. Have you arrived at any such a conclusion?

A. Yes, I have.

Q. Will you state the amount of the rental value?

A. You do want the total amounts?

Q. Yes.

A. The total amount of the rental value as I figured it, and that includes the furniture and fixtures in the two different stores and offices.

(Testimony of Loyall R. Rugh.)

The Court: It does or does not include?

The Witness: It does include; and the total rental that I have is \$7260 a year.

Q. (By Mr. Pigg): How much of this total amount do you finally attribute to the fixtures and to the furniture and fixtures?

A. \$25 in the large store in Eugene, and \$15 in Junction City.

Q. You mean \$25 a month? A. Yes.

Q. Just state as briefly as you can, in your own way, Mr. Rugh, as to how you arrived at that value.

A. Well, I approached this problem in three different ways. First and mainly I approached it from the standpoint [241] of other property that I compared them to, and several properties that I was conversant with, and I compared notes and compared one with the other, and in that way I felt it was quite a good way to establish a fair rental, and kept on the conservative side for these purposes. For instance, I took a piece of property rented by the Consolidated Freight Company, 265 West Eighth Street, and that property in 1941 was rented for \$175 a month; that building was 66 x 166, and the property was and is now in a very poor repair. In fact, I had a contractor one of the leading contractors in Eugene, look at it to give me an estimate of what it would cost to put it in repair, and he said that he—I got that for the owner and wrote to him about it—and he said that it would take from eight to ten thousand dollars to put the

(Testimony of Loyall R. Rugh.)

building in repair. It is a one-story building, with 66 feet in front.

The Court: I believe the court is not interested in the details about other property. We want to talk about this property.

The Witness: As a comparison, the rental on the main building on 669 High, that is 89 x 145. That building would be worth \$350 a month. I cut it down conservatively, and I rated it as \$225 a month. There is another piece of property that is occupied by a dealer in building materials, and has been for many years, the Scobert business, on West Seventh Street. [242]

The Court: Is that property that belongs to the Twin Oaks?

The Witness: No.

The Court: Then don't talk to us about it.

The Witness: Well, I used that as a comparison.

The Court: Give us the values that you placed on the rentals of the Twin Oaks property.

The Witness: To make a long story short. I gave the cement building which is 34 x 48, and the shed back of it, 40 x 97 feet, plus the land on which it stands, and the rest of that lot—and a part of lot 3 in the back, less the railroad trackage, which I segregated or appraised separately—I placed the rental of that at \$125 a month.

And the Junction City property I placed a rental on that of \$50 a month plus \$15 a month for the furniture. On the Cottage Grove property, I placed

(Testimony of Loyall R. Rugh.)

a rental of \$50 a month—well, \$65 a month including the lot facing on the highway which was a good parking lot adjoining the Pontiac corner—adjoining the Pontiac agency, that is used for parking.

And then I took another method. I appraised the value of the property so as to take another way of figuring the rental value, and the main building on High Street, 669 High, which I learned would have cost in 1941 approximately \$38,000 to build, and I also learned it was remodeled in 1940, so that it was put in good shape; so I appraised that building at \$25,000, and the cement building, 34 x 48, which, by the way, has a laminated floor and hydraulic elevator—a very good solid building—I appraised that as \$10,000. The shed that was burned down, I appraised that with what the insurance brought, \$7400. And the Junction City building, I took the tile building because we were told by the man up there, Mr. Hanson——

Mr. Pigg: Who is Mr. Hanson?

The Witness: He is the manager of the company up there. I was told that that had been there for ten or twelve years. The buildings I appraised at \$5400. And the Cottage Grove building, which I learned would have cost about \$22,000 in 1941, I appraised at \$8000. That made \$55,800. And the lot, 85 x 145 on which the main building stands on High Street, I appraised that at \$10,580 in 1941; and the lot, 80 x 145 on which the cement building stands, with

(Testimony of Loyall R. Rugh.)

the shed in the back, I appraised at \$10,000. My reason was because it was a corner.

I segregated the trackage. The track stands on a piece of ground 15 x 240 feet, and it is paved, and it adjoins the paved alley. I learned from competent people that the trackage is worth \$5 a running foot; and the ground I appraised at \$3500. That makes \$15,500.2 And I cut that down to \$10,000, although the track is in good shape—that is, the land value. And the buildings—that ran it to \$91,309. And then the land value and all runs it up to \$95,339.

Another way. I figured the value of the buildings, and then I figured depreciation on the frame buildings at 3 per cent a year, which amounted to \$1374, and the depreciation to the cement building at 2 per cent, \$200, making \$1574. The taxes were \$413 and then I took the insurance and established a fair amount of insurance carriage. On buildings and furniture, the rate would be 90 per cent coverage, 14.14 a thousand, and that figures \$888.59. The total expense then charged against that property for those items would be \$3396.57. In that should be included upkeep which I put at a low figure, \$500.

Then I figure 5 per cent on the investment that an owner should have, which amounted to \$144,566.95, and that brought a total of \$7963.54. That is one way of arriving at the base rental, although that is higher than I figured it.

The Court: On what basis did you figure the \$7900?

(Testimony of Loyall R. Rugh.)

The Witness: I figures 5 per cent. And then I approached it from another angle. I learned through what was stated—I learned that the gross income for 1941 was \$375,000.

The Court: Gross income of what?

The Witness: On this business.

The Court: On what?

The Witness: On the business. [245]

The Court: On the Twin Oaks Company?

The Witness: Twin Oaks. I think it was \$375,000, which I learned from people who are acquainted with it, and from testimony. Now, from people who are engaged in this business of leasing property on a percentage basis, they rent all the way from 5 to 7 or 8 or ten or 12 per cent. I learned that from competent people. But, in this kind of a business, 2½ per cent would be a very fair estimate of a business of this kind, the retail builders supply business, so I took 2½ per cent, which amounts to \$9375. So that I figured my statement on the original estimate, as to basing it on comparative rentals, in which I was conservative, was a fair estimate. That would give it less value than these other properties that I compared it with, and in that way I figured that the figure of \$7260 a year would be very conservative and very fair; and that did not include the \$300, I believe, on the High Street property, which I didn't know about.

Q. (By Mr. Pigg): When you say 5 per cent

(Testimony of Loyall R. Rugh.)

net return, do you mean before or after taxes and depreciation?

A. That is after taxes and depreciation and insurance and upkeep.

Mr. Pigg: You may cross-examine.

Cross-Examination

By Mr. Davidson: [246]

Q. Mr. Rugh, do you know of any instance in which a building material yard has been leased of $2\frac{1}{2}$ per cent of their gross sales?

A. No, I do not.

Q. In other words, have you any foundation for your statement that that is at all customary in the building material business?

A. Just one way of checking it; it is customary to rent on that basis, and it is becoming more and more customary.

Q. Do you know of any instances outside of the clothing business, shoe business, and general merchandising business, and dry goods, where the leases have been on that basis?

A. I do not see why they should not be.

Q. Answer the question? A. No.

Q. You don't know of any?

A. That's right.

Q. So far as you know, that is not any basis for figuring the fair rental value?

A. I think that is one basis.

Q. But you don't know of any business that is

(Testimony of Loyall R. Rugh.)

rented on that basis, I mean, a building material supply business? A. No.

Q. The basis on which you figured, were those 1941 values? A. Yes. [247]

Q. How did you arrive at the 1941 values?

A. I arrived at them through handling properties, and just general experience and common sense and judgment.

Q. You based it on your own experience as to sales of property that were made in 1941, and did not relate it to the present day values; you just took them for what you knew in 1941?

A. I know of property that sold recently that would be three times as high as any property values at that time; and I took that into consideration, and based that on what it would be comparatively in 1941.

Q. How did you do that? Did you take it at one third of what they are selling today, or didn't you?

A. In some cases it would be one third; in some cases there would not be nearly that much variation. It is based on the knowledge of the sale of several properties here in the last few years.

Q. Did you find what furniture and fixtures they had in 1941, in January 1941, or did you take the present furniture and fixtures?

A. I took about half of the present fixtures, and I found out afterwards what the fixtures were valued at, and I found that my first figure was quite

(Testimony of Loyall R. Rugh.)

a bit lower. I based my idea on what the rental value would be in 1941 on the fixtures. [248]

Q. Your appraisals that you have made for the State Highway Commission, have they been of the rental value? A. No; the land value.

Q. And those that you have made have not been in any event of rental value?

A. Only property that I appraised was for a rental value.

Q. And the appraisals for the State Highway Commission were appraisals for sale?

A. Yes.

Q. You did not appraise the rental values?

A. I appraised the sale value, and I appraised somewhat on the same basis for the rental value too.

Q. Mr. Rugh, so far as the Cottage Grove property is concerned, wouldn't you think that a fair indication of what the rental value was would be what they had been able to get?

A. No; I have known of cases where things have changed very materially. They started to pick up in 1941, and because a man does not rent a piece of property in one period of time, that is no reason why it doesn't have rental value at that time or at another. Just because the property could not be rented at that time doesn't mean that they couldn't make it up at a later time. I know of people in Eugene who are making up for lost time for rentals. They took a beating then, and they are now reaping a harvest. [249]

(Testimony of Loyall R. Rugh.)

Q. This is 1948?

A. Well, the same thing applies.

Q. In other words, you think that at the beginning of 1941 any assessment of fair rental value should have anticipated that there would be an increase in demand for the rental of such properties?

A. The demand was broadening; there was a demand.

Q. It looked that way in 1929.

A. I am not thinking about 1929; I am thinking about 1941.

Q. Your theory is that in January 1941, we should have anticipated that things were going to go up, and we should have based the rentals on that?

A. The indication was that things were coming up.

Q. Would you say that if you were occupying a building, and thereafter you wanted to renew the lease, that the profit that you had made out of that business would not be some indication of what the occupancy value of the property would be to you.

A. That would be one factor. There are other factors that enter into it.

Q. Yes, but would you say. if you were operating a business here, making an average of \$2000 a year for 5 years before the payment of rent, that you could afford to enter into lease for \$7500 a year? Would you or would you not want [250] to enter into such a lease?

(Testimony of Loyall R. Rugh.)

A. Well, I'm not going back into that; I don't know.

Q. You don't know, but you think you might?

A. It would depend on how it looked when I went into the lease. I have leased property here, and people have made money at what I considered a fair rental value.

Q. It was fair if you made money, but if you didn't make money, it would not be fair?

A. That did not enter into it; one business may be successful while another is not, at the same place.

Mr. Davidson: That is all.

Redirect Examination

By Mr. Pigg:

Q. As to what constitutes a fair rental value of a property, did your opinion depend in any wise on any one particular person to pay that price?

A. Not necessarily. For instance, that property on High Street is *very located*, if I may say, and it is 5½ blocks from the First National Bank, close in, well located, and other people—there have been many people looking for places to rent, and we have always had a shortage in Eugene for business rentals.

Q. What is your understanding of the term "fair market value" at this time, and in connection with your studying this case for the purpose for which you made your study? [251]

A. That would relate to where you had a man

(Testimony of Loyall R. Rugh.)

that wanted to sell, and a willing buyer, not under compulsion, that is, with a buyer who wanted to buy but was not compelled to buy, and a seller who wanted to sell but who was not compelled to sell, and where each of the parties, the seller and the buyer would be conversant with the facts concerning the property. And, of course, there are a lot of ways of describing it, but that is one of the main factors.

Q. Under those circumstances, would you assume the purchaser or the lessee would be the person with the ability to pay a fair rental?

A. Yes, I would think the piece of property that was especially adapted for the use that he wanted it, could be leased to him at that figure.

Q. And that is the assumption you made or took at the time you made the appraisal?

A. Yes. I figure there's a reasonable amount you can ask for the rental of a property, and if someone is making use of it, there is a reasonable way of arriving at the fair rental value. And that is the way I have figured. I have tried to be realistic on it.

Mr. Pigg: That's all.

Mr. Davidson: That's all.

The Court: You may stand aside.

(Witness excused.) [252]

The Court: Call the next witness.

Mr. Pigg: The Respondent rests.

Mr. Davidson: We should like to call Mr. Rogers back for about five minutes to clear up some things.

Whereupon,

JOHN J. ROGERS

recalled as a witness by and on behalf of the Petitioner, having been previously sworn, was further examined and testified as follows:

Further Direct Examination

By Mr. Davidson:

Q. You have already been sworn?

A. Yes.

Q. Will you state to what extent the buildings constituting the Junction City plant were added to after January 1, 1941?

A. The hollow tile building that was mentioned was repaired. It was a repair job. There was an old frame building there, an old lean-to, and it was not constructed and used as now. It was put to about the same use; but it was not constructed the same way; in the process of the later years, about 1944 or 1945, we made the building as it is now; that is, we remodeled the building.

Q. The remodeling was after 1941?

A. Way after that. [253]

Q. Was that the only change in the Junction City property? A. I know of nothing else.

Q. To what extent was the Eugene building enlarged or changed after January 1, 1941?

A. About 4 years ago we had a very crude store; we had a partition, and then another partition, and then we had a toilet between them; and about 4 years ago we tore out and remodeled the inside; we

(Testimony of John J. Rogers.)

remodeled and tore out the partition, and a lot of painting and closed the driveways and put in some shelves, and put in a few signs, display tables, and so on, and called it a store. That is what we have at the present time.

Q. That is the store on High Street to which Mr. Hyde referred? A. Yes.

Q. What other changes were made in the Eugene property?

The Court: That change was made about 4 years ago; you mean about 1944?

The Witness: I would say 1945, Judge. About 3 years ago an old wreck of a building immediately to the rear of the old concrete building—by the way, that concrete building must be—I wouldn't want to guess how old it is—we have maintained it well—I would say honestly that it is 30 years old. It is charged off, and right in the rear of that [254] was a shed that we had to use because we had lumber to store there every once in a while; and we braced up the sides there and patched up the floor here and there and then the roof. And then that building burned about 4 years ago, and the figure I gave to Mr. Hyde was replacement figure. It was not the value of the building.

Q. (By Mr. Davidson): Was that building replaced with a shed?

A. It was. But the insurance company inspected it, and to us it had a value, but to anybody else it wasn't worth a nickel. Also, in the last three or

(Testimony of John J. Rogers.)

four years, we have surrounded our entire yard with a cyclone fence.

Q. Do you think that is about all?

A. The property on Charleston Street, where we had our coal bunkers, we were very happy to dispose of as of the first of January of this year. The property that we just sold consisted of a lease from the Oregon Electric, a little office, probably 10 x 12, and some concrete bunkers; and a wooden frame building also, and two Ford trucks, furniture and equipment, unloading equipment—the whole thing we sold for \$5000, and we felt happy to get it.

The Court: When did you make that sale?

The Witness: The first of January of this year.

Mr. Davidson: That is all.

The Witness: May I make a comment about Cottage [255] Grove?

Q. (By Mr. Davidson): Yes, tell us about the Cottage Grove property. Did you make any changes there since 1941?

A. We have maintained that property. The building was a wreck, and more recently we painted it and overhauled it and made it so that it is now producing some income.

Mr. Davidson: That is all.

The Court: I would like to ask one question. This property which your corporation rented to the partnership on January 1, 1941, what do you regard the value of that to be?

The Witness: Judge, the depreciated real estate,

(Testimony of John J. Rogers.)

furniture and fixtures, buildings, and everything that we transferred, we estimated, I think, \$35,000. As I said to you this morning, we didn't know whether it was worth \$35,000 or not.

The Court: Why?

The Witness: Because the value of the property depended upon its proximity or to the proximity of a spur track that went through the back of it. We have now lost the spur track, and have been compelled to acquire 4 acres of land elsewhere and put in a spur track of about 400 feet, and to add tracks so that we can enlarge our merchandise storage two and one half miles away, where we can unload our merchandise. That is a substitute for the spur track that has been there [256] and was there when we bought the property. That property, as a lumber yard, isn't worth more than fifty cents on the dollar in the terms of what a yard would be worth to a lumberman when the spur track was a permanent thing.

The Court: Are there any further questions of the witness?

Mr. Pigg: No cross-examination.

Mr. Davidson: Nothing further.

The Court: You may stand aside.

(Witness excused.)

Mr. Davidson: That is all for the Petitioner.

Mr. Pigg: No further testimony for the Respondent.

The Court: Does that close the testimony?

Mr. Davidson: That closes the oral testimony.

The Court: Are there any documents to be introduced?

Mr. Pigg: There are some additional documents, Your Honor, many of which have been identified, and which I offer, without objection by Petitioner. The first one is Respondent's A for identification.

The Court: What is that?

Mr. Pigg: That is the income tax return of the Twin Oaks Builders Supply Company, and it also includes the corporation's excess profits tax return for the same year.

The Court: It may be admitted as Respondent's A. [257]

(The document referred to, heretofore marked as Respondent's Exhibit A for identification, was received in evidence as Respondent's Exhibit A.)

Mr. Pigg: As Respondent's B for identification, which is a certified copy of a warranty deed dated in July of 1941.

The Court: From whom and to whom?

Mr. Pigg: From Martha E. McCormack to the Twin Oaks Company.

The Court: Was that what was referred to as the McCormack property?

Mr. Pigg: That's right.

The Court: That is Respondent's B?

Mr. Pigg: Yes.

The Court: That will be received and marked as Respondent's B.

(The document referred to, heretofore marked as Respondent's Exhibit B for identification, was received in evidence as Respondent's Exhibit B.)

Mr. Pigg: And as Respondent's C, a document which has already been identified, which is a certified copy of a deed, December 1, 1943, from Richard Orem to Twin Oaks.

The Court: It will be received and marked as Respondent's C. [258]

(The document referred to, heretofore marked as Respondent's Exhibit C for identification, was received in evidence as Respondent's Exhibit C.)

Mr. Pigg: As Respondent's E,—

The Court: What became of Respondent's D?

Mr. Pigg: Respondent's D is the document which I stated a while ago would not be offered in evidence.

The Court: All right.

Mr. Pigg: As Respondent's E, a document heretofore identified, which is a certified copy of a warranty deed from Sherman L. Godard to Twin Oaks Lumber Company, which was filed for record on July 23, 1929.

The Court: It will be received and marked as Respondent's E. Let the record show there is no Respondent's Exhibit D.

(The document referred to, heretofore marked as Respondent's Exhibit E for identification, was received in evidence as Respondent's Exhibit E.)

Mr. Pigg: As Respondent's F, a document heretofore identified as such, being a photostatic copy of a deed from C. O. Peterson et ux to Twin Oaks Lumber Company, filed for record on January 26, 1929.

The Court: That will be received and admitted as Respondent's F. [259]

(The document referred to, heretofore marked as Respondent's Exhibit F for identification, was received in evidence as Respondent's Exhibit F.)

Mr. Pigg: As Respondent's G, a document heretofore identified as such, being a certified photostatic copy of a warranty deed from F. L. Charmers et ux to Twin Oaks Lumber Company, filed for record June 8, 1925.

The Court: It will be admitted as Respondent's G.

(The document referred to, heretofore marked as Respondent's Exhibit G for identification, was received in evidence as Respondent's Exhibit G.)

Mr. Pigg: As Respondent's H, a document heretofore identified as such, which is a certified copy of a warranty deed,—may I withdraw the offer of Exhibit H, and let the record show there will be no Exhibit H.

The Court: It may be withdrawn.

Mr. Pigg: If the court please, the exhibit which I asked to withdraw, I find is the same as Exhibit B.

The Court: Exhibit H, which you decided to withdraw is the same as Exhibit B; is that it?

Mr. Pigg: That is right.

The Court: All right.

Mr. Pigg: I offer at this time Respondent's I, the photographs which Witness Hyde identified with respect to Exhibit H for identification, and the only purpose of the offer, [260] is to show a piece of property that is not in use in the business of the Petitioner, which is affected by the new highway.

Mr. Davidson: We object to it on the same ground as the other photographs; they speak for themselves, of course, but they are taken seven and one half years late.

The Court: Is this one of the late photographs?

Mr. Davidson: Yes.

The Court: The objection is sustained.

Mr. Pigg: Exhibit J, a document heretofore identified as such,—and may I also withdraw Exhibit J?

The Court: It may be withdrawn. Respondent's J is withdrawn.

Mr. Pigg: At this time, as Respondent's Exhibit K, the corporation income declared value excess profits tax return, to which is attached also the return of a personal holding company of Twin Oaks Company for the year 1944.

Mr. Davidson: No objection.

The Court: It will be admitted as Respondent's K.

(The document referred to was marked and received in evidence as Respondent's Exhibit K.)

Mr. Pigg: As Respondent's L, the corporation income and declared value excess profits tax return of the Twin Oaks Company for the year 1942, attached to which is also the original of the personal holding company return of the same [261] corporation, the same year.

The Court: It will be admitted as Respondent's L.

(The document referred to was marked and received in evidence as Respondent's Exhibit L.)

Mr. Pigg: And as Respondent's Exhibit M, the corporation income and declared value excess profits return of the Twin Oaks Company for the year 1943, to which is also attached the personal holding company return for the same corporation for the same year.

The Court: It will be admitted as Respondent's M.

(The document referred to was marked and received in evidence as Respondent's Exhibit M.)

Mr. Pigg: As Respondent's N, the income and

the declared value excess profits return of the Twin Oaks Company for the year 1944, to which is attached the personal holding company return for the same company for the same year.

The Court: It will be received as Respondent's N.

(The document referred to was marked and received in evidence as Respondent's Exhibit N.)

Mr. Pigg: As Respondent's O, the partnership return of income of the Twin Oaks Builders Supply Company of 1941.

The Court: It will be admitted as Respondent's O.

(The document referred to was marked and received in evidence as Respondent's Exhibit O.) [262]

Mr. Pigg: And as Respondent's P, the partnership return of income of the Twin Oaks Builders Supply Company for the year 1942.

The Court: It will be admitted as Respondent's P.

(The document referred to was marked and received in evidence as Respondent's Exhibit P.)

Mr. Pigg: As Respondent's Q, the partnership return of income for the Twin Oaks Builders Supply Company for the year 1943, with attached schedule.

The Court: It will be admitted as Respondent's Q.

(The document referred to was marked and received in evidence as Respondent's Exhibit Q.)

Mr. Pigg: As Respondent's Exhibit R, the partnership return of income of the Twin Oaks Builders Supply Company, with attached schedules, for the year 1944.

The Court: It will be admitted as Respondent's R.

(The document referred to was marked and received in evidence as Respondent's Exhibit R.)

Mr. Pigg: As Respondent's S, we offer the individual return of Corabelle M. Rogers for the year 1941.

The Court: It will be admitted as Respondent's S.

(The document referred to was marked and received in evidence as Respondent's Exhibit S.)

Mr. Pigg: As Respondent's Exhibit T, the return of Corabelle M. Rogers for the year 1942.

The Court: It will be admitted as Respondent's T.

(The document referred to was marked and received in evidence as Respondent's Exhibit T.)

Mr. Pigg: As Exhibit U, we offer the return of Corabelle M. Rogers for the year 1943.

The Court: It will be admitted as Respondent's U.

(The document referred to was marked and received in evidence as Respondent's Exhibit U.)

Mr. Pigg: As Respondent's V, the return of Corabelle M. Rogers for the year 1944.

The Court: It will be admitted as Respondent's Exhibit V.

(The document referred to was marked and received in evidence as Respondent's Exhibit V.)

Mr. Pigg: As Respondent's Exhibit W, the return of Louis C. Scharpf for the year 1941.

The Court: It will be admitted as Respondent's Exhibit W.

(The document referred to was marked and received in evidence as Respondent's Exhibit W.)

Mr. Pigg: And as Respondent's Exhibit X, the return of Louis C. Scharpf for the year 1942.

The Court: It will be admitted as Respondent's Exhibit X.

(The document referred to was marked and received in evidence as Respondent's Exhibit X.) [264]

Mr. Pigg: As Respondent's Exhibit Y, the return of Louis C. Scharpf for the year 1943.

The Court: It will be admitted as Respondent's Y.

(The document referred to was marked and received in evidence as Respondent's Exhibit Y.)

Mr. Pigg: Let the record show that I have just detached from the returns some papers that were not a part of the return.

The Court: From Exhibit Y?

Mr. Pigg: Yes, Your Honor.

The Court: Very well.

Mr. Pigg: I will offer the return of Louis C. Scharpf for the year 1944 as an exhibit.

The Court: That will be admitted as Respondent's Exhibit Z.

(The document referred to was marked and received in evidence as Respondent's Exhibit Z.)

Mr. Pigg: As Respondent's AA, the return of Eva M. Scharpf for the year 1941.

The Court: It will be admitted as Respondent's Exhibit AA.

(The document referred to was marked and received in evidence as Respondent's Exhibit AA.)

Mr. Pigg: As Respondent's Exhibit BB, the return of Eva M. Scharpf for the year 1942. [265]

The Court: It will be admitted and so marked.

(The document referred to was marked and received in evidence as Respondent's Exhibit BB.)

Mr. Pigg: As Respondent's CC, the return of Eva M. Scharpf for the year 1943.

The Court: That will be admitted and marked as Respondent's CC.

(The document referred to was marked and received in evidence as Respondent's Exhibit CC.)

Mr. Pigg: As Respondent's DD, the return of Eva M. Scharpf for the year 1944, and let the record show that the last page, page 4, has been torn loose from the others, and only fastened with a clip.

The Court: It will be so noted and the exhibit will be admitted as Respondent's DD.

(The document referred to was marked and received in evidence as Respondent's Exhibit DD.)

Mr. Pigg: As Respondent's Exhibit EE, the return of John J. Rogers for the year 1941.

The Court: It will be admitted and marked as Respondent's EE.

(The document referred to was marked and received in evidence as Respondent's Exhibit EE.)

Mr. Pigg: As Exhibit FF, the return of John J. Rogers for the year 1942. [266]

The Court: It will be admitted and so marked.

(The document referred to was marked and received in evidence as Respondent's Exhibit FF.)

Mr. Pigg: As Exhibit GG, the return of John J. Rogers for the year 1944.

The Court: It will be admitted and marked as Respondent's Exhibit GG.

(The document referred to was marked and received in evidence as Respondent's Exhibit GG.)

Mr. Pigg: Your Honor, let the record show that at the moment I cannot locate the 1943 return of John J. Rogers. I believe that counsel is willing to stipulate, if I can find it before the court leaves, to have it admitted as Respondent's Exhibit HH.

Mr. Davidson: No objection.

The Court: It will be received and marked as HH when received.

Mr. Pigg: As Respondent's II, which I wish to offer, I understand counsel has certain objections to, or, reservations.

The Court: What is the document? Is that the document showing a comparison of the tax liability based upon non-recognition of the partnership doing business as the Twin Oaks Builders Supply Company, and this following list of papers?

Mr. Pigg: Those figures and schedules and computations [267] have been prepared for the Re-

spondent for the purpose of showing the tax reduction, or the difference between the amount of taxes that are payable or should be paid on the basis of the partnership returns arrangement, as compared with the income if it was returned by the corporation as the Respondent contends it should be. It is the difference between the two in schedule form. I understand Mr. Davidson has some objection.

Mr. Davidson: I think that is not admissible for any purpose. In the first place, it is not based upon any facts, but merely on an assumption. It is highly prejudicial in that it attempts to show, and the only purpose of it is to show that there was less tax liability under the partnership than as the Respondent contends. Furthermore, it is based upon the assumption that it is a corporation, and then it comes under the excess profits tax, when you use the declared value of the corporation, based upon the assumption that it is a corporation. He attempts to show that the salaries would have been paid at the same rate they were in 1940; not what they were, but what the government allowed them on a settlement. It does not show that the government is now assuming for these years against these individuals, taxes that are considerable over 100 per cent of the net income. It is an assumption of facts, not in the record, and is therefore inadmissible.

The Court: I sustain the objection. It is just a matter of computation. It is was admitted, it would have to be introduced under the hypotheses

claimed, and the court can take judicial notice of the rates.

Mr. Pigg: It was only offered for the purpose of convenience, and I believe the computation is as much material as some matter that I made no objection to. It is only for the purpose of aiding the court, giving the court a concrete picture, from which it can make any deductions or adjustment or any hypothesis that it may see fit. If the court does not desire it, of course I will not press it.

The Court: I don't believe it should be received.

Mr. Pigg: It could not be offered as any evidence, of course.

The Court: It is a computation. And I think we have so many figures here now that it wouldn't help any. Does that conclude your offer?

Mr. Pigg: Yes, that completes the Respondent's case.

Mr. Davidson: I think that before we go we should check the exhibits.

The Court: The next question is the matter of briefs. Where you have a small record, I don't think there is any particular value in having briefs seriatim, but in a case where the record is quite long, my preference is for seriatim briefs. How much time does the Petitioner desire to have? [269]

Mr. Davidson: At least the 45 days.

The Court: We will make Petitioner's brief due in 45 days. What date will that be?

The Clerk: July 23.

The Court: July 23. And what time would the respondent desire in which to file a reply?

Mr. Pigg: Of course 30 days is the customary time, but as Your Honor knows, when we have a number of briefs to write in a longer case, we cannot always get them in there on the same date.

The Court: I will give until the first of September for the Respondent. What day will that be?

The Clerk: What will be Wednesday.

The Court: I will give you until September 3 for the Respondent to reply. That is, for the Respondent's brief; and then the Petitioner will have 20 days thereafter. It will be September 23.

(Whereupon at 5:45 p.m. June 8, 1948, the case was concluded.)

Filed T.C.U.S. July 23, 1948. [270]

The Tax Court of the United States

Docket No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER ALLOWING WITHDRAWAL OF
COUNSEL OF RECORD FOR PETITIONER

Based on motion filed herein by Spencer R. Collins, 444 Miner Building, Eugene, Oregon;

It Is Hereby Ordered, that leave be and hereby is

granted to said Spencer R. Collins to withdraw as counsel of record for the Petitioner herein.

Done this 7th day of June, 1948.

[Seal] /s/ LUTHER A. JOHNSON,
Judge.

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT AND OPINION

Johnson, Judge:

The Commissioner determined the following deficiencies in petitioner's income tax, declared value excess-profits tax and excess profits tax and penalties:

Year	Income Tax	Declared Value Excess-Profits Tax	Excess Profits Tax	Penalties
1942.....	\$1,394.61	\$ 373.11	\$.....	\$.....
1943.....	3,120.38	3,778.43	11,311.08	2,827.77
1944.....	4,532.68	6,565.25	24,562.88	6,140.72

He included in the petitioner corporation's income the profits of a partnership formed in 1941 by the shareholders and their spouses to conduct petitioners' business with current assets acquired from petitioner for their note and their assumption of certain obligations of petitioner, on premises which petitioner leased to them. Petitioner assails the determination that the partnership and conveyances were shams which should not be recognized for tax

purposes; assails the disallowance of a net operating loss carry-over from 1941; computed under the theory that the partnership was recognizable, and assails the determination of delinquency penalties for its failure to file excess profits tax returns for 1943 and 1944.

FINDINGS OF FACT

Petitioner, an Oregon corporation with principal office at Eugene, Oregon, filed its income and declared value excess-profits tax returns for the years 1942, 1943 and 1944 with the collector of internal revenue for the district of Oregon. It was organized in 1924 and engaged in the sale of lumber and builders supplies at Eugene and Junction City, Oregon, and until 1937 at Cottage Grove, Oregon. In 1941 it had outstanding 946 shares of stock of a par value of \$94,600, or \$100 each. Half of these shares were owned by John J. Rogers, petitioner's president, and the other half were owned by Louis C. Scharpf, petitioner's secretary-treasurer, and his wife, Eva M. Scharpf, in the amounts of 35.3 and 437.7 shares, respectively. Two of the Scharpf shares were held in the name of E. R. Bryson, an attorney, to qualify him as a director with Rogers and Scharpf. Eva M. Scharpf purchased her shares at various times with funds inherited from her father. She and Rogers had acquired most of their shares before 1930.

During the years 1935-1940 petitioner's books showed assets which were carried at total values ranging from \$117,283.26 in 1938 to \$150,531.66 in 1940. These assets consisted chiefly of merchandise

inventory and accounts receivable and in addition there were buildings, furniture and fixtures which had a book value of about \$37,000. During 1935-1940 petitioner sustained small operating losses, but receipts from other sources produced net incomes of a little over \$2,000 for 1936, 1937 and 1939, \$677.05 for 1935, and \$6,036.35 for 1940. As officers, Rogers and Scharpf received equal salaries which, combined, ranged from \$9,800 in 1937 to \$14,400 in 1940. Both were actively engaged in the conduct of petitioner's business; Rogers purchased stocks of lumber, shingles, molding and coal and had charge of credit and collections; Scharpf made purchases of all other building materials handled. Their wives rendered no services.

In the latter part of 1939 Scharpf suggested to Rogers that the business be conducted as a partnership. Rogers was not agreeable to the change, being reluctant to assume the unlimited liability of a partner. Scharpf persisted, however, and during 1940 both had a number of conferences with Bryson, the attorney, who had given them advice for many years. The attorney recommended acceptance of a plan to which Rogers finally assented, and pursuant thereto Rogers, Scharpf and their wives made a partnership agreement as of January 1, 1941, whereby the four were to conduct the business as equal partners with operating assets which petitioner was to transfer to them and on premises which petitioner was to retain and rent to them.

At the close of 1940 petitioner's balance sheet showed the following assets and liabilities:

Assets	
Cash	\$ 243.96
Notes & Accounts Receivable.....	37,477.76
Merchandise	70,892.48
Investments	2,926.09
Land	23,993.25
Buildings	\$26,276.49
Furniture	6,959.28
Trucks	5,239.49
	<hr/>
	\$38,475.26
Less: Depreciation	23,653.78
	<hr/>
	14,821.48
Prepaid Insurance	176.64
	<hr/>
Total	\$150,531.66

Liabilities	
Accounts Payable	\$ 16,271.55
Notes Payable	34,238.00
Accrued Taxes	3,001.89
Earned Surplus	2,420.22
Capital Stock	94,600.00
	<hr/>
Total	\$150,531.66

The accounts or notes payable comprised \$2,144 due Rogers, of which \$1,200 was salary and \$944 dividends; \$1,270.60 due Scharpf, of which \$1,200 was salary and \$70.60 dividends; a note for \$1,500 due Corabelle M. Rogers, and a dividend of \$873.40 due Eva M. Scharpf. Petitioner's land and buildings consisted of town lots at Eugene; improved with a concrete building and hydraulic elevator, a large frame building, a storage shed and spur railway track; two lots at Junction City improved with a hollow tile warehouse and a wooden shed, and an old warehouse and vacant lots at Cottage Grove. The

State Highway Commission had drafted plans to run a new highway across the principal property at Eugene, but later changed the highway routing. Petitioner also occupied leased premises. About nine-tenths of its sales were made at Eugene; one-tenth at Junction City, and the Cottage Grove property was sometimes rented, but produced little income.

Pursuant to the plan agreed upon for the formation of a partnership petitioner's directors on January 2, 1941, resolved to change petitioner's name from Twin Oaks Builders Supply Company to Twin Oaks Company and to accept the offer of Rogers, Scharpf and their wives to acquire its current assets at book values in consideration of their assumption of its accounts payable and their 2 per cent note for the balance; to lease to them its fixed assets, and to discontinue its builders supply business. On January 25, but as of January 1, 1941, Rogers, Scharpf and their wives each signed a partnership agreement, declaring their intention to associate themselves together as copartners under the firm name of Twin Oaks Builders Supply Company for purchasing from petitioner, which then had the same name, all its assets except real estate, fixtures and equipment and for leasing the latter. It was agreed that each contribute \$2,000 and share equally in profits and losses; that the partnership engage in the same business as that previously conducted by petitioner; that such business be conducted by Rogers and Scharpf, each performing "the work

heretofore by him performed” and each being entitled to a salary in addition to his share of the profits; that a bank account be opened in the partnership’s name against which checks could be drawn by Rogers or Scharpf or by “some person to whom they may jointly in writing delegate such power”.

Each of the partners shall have an equal voice in the control of the business and the affairs of the copartnership and in the decision of any questions which may arise.

The duration of the agreement was not limited in time, but either pair of spouses desiring dissolution was required to notify the other pair and offer to purchase the others’ interest not only in the partnership but also in petitioner’s stock, and to assume the indebtedness of both firms. On acceptance of the offer the sellers were to agree not to engage in the same business in the area for four years. If the offer should not be accepted within 90 days, the offering spouses could require a termination and liquidation of the partnership. For the purposes of these provisions each pair of spouses “shall be deemed as one copartner”. Upon the death of a wife the surviving husband was bound to purchase her interest in the partnership and the corporation for a price determinable by reference to book value. Upon the death of a husband the surviving husband and his spouse had a 90-day option to purchase the interests of both the others on like terms. These terms provided for installment payments with security and the arbitration of disputes. By a contract

of May 31, 1938, Rogers, as party of the first part and owner of one-half of petitioner's shares, and Scharpf and wife, as parties of the second part and owners of the other half, had agreed that upon the death of either husband, the survivor should have the right to acquire the other party's stock in petitioner on like terms. By a "Supplement to Partnership Agreement", signed January 30, 1941, it was recited that Corabelle M. Rogers and Eva M. Scharpf "render and are expected to continue to render some personal services to the partnership" and it was agreed that each "be paid a salary of \$25.00 per month", regardless of profits and losses for the services which were to be performed "at their convenience".

On January 2, 1941, Rogers, Scharpf and their wives signed a certificate of their intention to conduct a lumber and building supplies business at Eugene and Junction City, Oregon, under the assumed name of Twin Oaks Builders Supply Company, and filed it in the public records of Lane County, Oregon, on January 18. The partnership, by Rogers, gave to petitioner its note, dated January 2, 1941, in the amount of \$89,378.35 payable in one year with 2 per cent interest. This amount represented the excess of the book value of current assets covered by the purchase offer above the accounts payable which the partnership was to assume. As of January 1, 1941, entries were made in petitioner's books indicating the transfer of its cash, notes and accounts receivable, merchandise, investments of

\$2,726.09, and delivery equipment of \$1,809.61 to the partnership, and the elimination of \$16,271.55 and \$7,500 of accounts and notes payable, respectively, from its liabilities.

As of the same date books were opened in the name of the partnership, indicating as its assets the cash, notes and accounts receivable, the merchandise, investments and delivery equipment in the same amounts transferred from petitioner's books and also an account receivable of \$500 from Rogers. Liabilities were shown as accounts payable of \$16,271.55, notes payable of \$89,378.35, and "partners' investment accounts" of \$8,000. The \$8,000, representing the \$2,000 contribution of each partner required by the agreement, was provided largely by the cancellation of amounts owed to them or to members of their families by petitioner on account of unpaid salary, dividends and monies advanced.

By a written agreement dated January 2, 1941, petitioner leased to the partnership all its remaining assets, consisting of the real properties, fixtures and equipment, for \$3,000 a year. The partnership on the same date filed with the State Industrial Accident Commission a "notice of engaging in hazardous occupation" and of employing 25 workmen on an estimated monthly pay roll of \$2,600. It registered with the State Unemployment Compensation Commission and filed required reports thereafter. It applied for and received a registration number under the Social Security Act. It advised the First National Bank of Eugene about petitioner's transfer

of assets to it, and opened an account with the bank from which each of the four partners was authorized to withdraw funds. It served formal notice on the bank in December 1944 that each of them had power to act for the firm in borrowing money, making and endorsing notes and in transferring assets.

After January 1941 the lumber and builders supply business was conducted by Rogers and Scharpf as before; the partnership bore the same name that petitioner had formerly borne; made contracts and transacted business in that name, and taxes were assessed against it in that name. There were no changes obvious to customers except the elimination of officers' names on stationery. The wives of Rogers and Scharpf, who had rendered no services before, sometimes signed pay roll checks and notes and listed accounts receivable once a month. Separate bank accounts and separate books were maintained for petitioner corporation and for the partnership. Petitioner's activities, as recorded, were limited to the owning and leasing of real estate and equipment. Its income for the years 1941-1944 consisted of the \$3,000 rent and interest on the note of the partnership and some very petty miscellaneous items. Its books indicated a loss of \$904 in 1941 and net incomes of a few hundred dollars for the succeeding years. In July 1941 it bought a lot and old frame residence adjoining its property in Eugene for between \$3,500 and \$4,000 and demolished the building. The lot has since been used in the builders supply business for storage. In

December 1943 it bought another lot and residence in Eugene for \$2,500. The property was then rented for \$66 a month; the tenant remained in possession and thereafter paid the rent to the partnership. In 1946 and 1947 the partnership paid \$4,200 to petitioner as rent. The books of the partnership indicate the following gross and net incomes for the years indicated:

Year	Gross Income	Net Income
1941	\$375,587.51	\$29,776.20
1942	262,931.20	18,525.29
1943	356,930.54	42,086.52
1944	512,001.16	66,119.33

The net income was each year credited on the partnership books to the partners' accounts, \$6,600 being credited to each husband as salary; \$300 to each wife as such and the remainder divided among them in equal parts. The partnership paid petitioner the \$89,378.35 due on the note plus 2 per cent interest thereon in annual installments ending in December 1946, using earnings and the proceeds of property sales. The partnership has endorsed petitioner's notes for bank loans.

For the years 1941-1944 corporation income and declared value excess-profits tax returns were filed for petitioner and separate partnership returns for the partnership. Petitioner filed no excess profits tax returns for 1943 and 1944. The Commissioner determined deficiencies in petitioner's income and declared value excess-profits taxes for 1942, 1943 and

1944, and in excess profits taxes for 1943 and 1944 by including in petitioner's income the profits reported by the partnership, with certain adjustments, under the view that the partnership, transfers of assets and leases to it were without substance and should be disregarded for Federal tax purposes. For the same reason petitioner's reported operating loss of 1941 was not allowed as a carry-over for 1942. Penalties were determined for petitioner's failure to file excess profits tax returns for 1943 and 1944.

OPINION

Petitioner charges respondent with error in refusing to recognize for tax purposes the existence of a partnership under the agreement of January 1, 1941, and in including partnership profits for the years 1942, 1943 and 1944 in its own income for those years. If the partnership should be recognized petitioner sustained in 1941 a net operating loss which it contends should be allowed in 1942 as a carry-over deduction. It further contends that even if the partnership was not recognizable, its contrary belief constituted reasonable cause for not filing excess profits tax returns for 1943 and 1944, and no penalty for failure to do so should be imposed under section 291, Internal Revenue Code.

Respondent defends his determinations by the argument that the technical creation of the partnership was form without substance and as such a mere device to reallocate income among family groups with resulting tax advantage in view. He

argues that the partnership was a sham which should be disregarded under the doctrine of *Helvering v. Clifford*, 309 U. S. 331, and like decisions, or in the alternative that additional amounts should be allocated to petitioner's income as adequate interest and rent under the provisions of section 45, Internal Revenue Code. He defends imposition of the penalties as warranted by the circumstances.

It is settled that a taxpayer is free to adopt such organization for his affairs as he may choose. But if the form employed is a sham without substance, it may be ignored for tax purposes. *Helvering v. Horst*, 311 U. S. 112; *Gregory v. Helvering*, 293 U. S. 465, even although valid in defining the parties' rights under state law. *Commissioner v. Tower*, 327 U. S. 280. An arrangement whereby income is spread, as here, among members of family groups invites special scrutiny. *Helvering v. Clifford*, *supra*. But each case must be decided on its own facts and those facts must be viewed as a whole.

Prior to January 1941 petitioner, as a corporation, had been engaged for many years in the purchase and sale of builders materials, including lumber. In this business, which was managed by its shareholders, Rogers and Scharpf, it used improved real estate, trucks and cash, and kept on hand a merchandise inventory. It also owned some other real property, which was rented or idle. The principal stockholder, Rogers, owned 473 shares, or half its stock; Scharpf owned 35.3 shares and Scharpf's wife owned the remaining 437.7 shares. In January

1941 Rogers and wife and Scharpf and wife, pursuant to an agreed plan, made a partnership agreement for the purpose of conducting petitioner's business as equal partners under petitioner's name. Petitioner's directors, Rogers, Scharpf and their attorney, Bryson, thereupon resolved to change petitioner's name; to sell all its assets except real estate to the partnership in consideration of the partnership's assumption of its accounts payable and the partnership's 2 per cent note in an amount which added to the liabilities assumed would equal the assets' book value. Petitioner further agreed to lease its real estate to the partnership for \$3,000 a year.

A performance of this agreement was indicated on petitioner's books by the elimination from its assets of all its cash, being \$243.96, notes and accounts receivable of \$37,477.76, merchandise inventory of \$70,892.48, investments of \$2,726.09, and delivery equipment of \$1,809.61, and the addition of a 2 per cent note receivable for \$89,378.35 from the partnership. These eliminations left it with recorded assets of the note; buildings, land and fixtures carried at \$37,005.12, a \$200 "investment" and \$176.64 prepaid insurance. From its liabilities, accounts payable of \$16,271.55 and notes payable of \$7,500 were eliminated, leaving recorded liabilities of \$26,738 notes payable and accrued taxes of \$3,001.89. As of the same date books were opened for the partnership showing exactly the same assets and values as those eliminated from petitioner's accounts and in addi-

tion an account receivable of \$500 from Rogers. As liabilities the \$89,378.35 note and accounts payable of \$16,271.55 were shown. "Partners' Investment Accounts" were recorded at \$8,000. This figure represents the \$2,000 contribution which each partner had agreed to contribute, and equals the \$7,500 notes eliminated from petitioner's liabilities plus the \$500 account receivable from Rogers.

After these initial entries separate books were kept for petitioner and the partnership. Business income was credited to the latter and after salary credits of \$6,600 each to Rogers and Scharpf, \$300 each to their wives, and a charge of \$3,000 for rent to petitioner, 25 per cent of the profits were credited to each partner. Petitioner's income, as recorded and reported, thereafter consisted of the \$3,000 rent and some interest on bonds and notes. Formalities were observed in making and paying the \$89,378.35 note with interest: in registering the partnership with tax officers and other public authorities concerned and in notifying banks. A formal lease of the real estate was executed by petitioner, and while, as respondent points out, no formal bill of sale for the assets was shown, we deem the transactions and steps for which petitioner seeks recognition adequately fortified in a technical sense.

But we do not perceive substance in these forms. After as before January 1941 the business was conducted by Rogers and Scharpf under the same name with the same assets in the same manner. No addi-

tional funds were paid in as operating capital; no assets were removed; and there was no change in policy or in managing personnel apart from the negligible services of the wives. Petitioner introduced much testimony to prove that the partners' contributions of \$2,000 each represented new capital needed, and the record is replete with details of amounts which it owed to Rogers, Scharpf and their wives on account of unpaid salary and dividends or for monies advanced, and with statements that the four "paid in" the excess above cancelled debts due them. But apparently (for the testimony is very vague) the "cash" payments were effected by the cancellation of petitioner's debts to the partners' children and the parent's payments to the child in reimbursement. At all events it is enough for our purposes that the partnership's opening balance sheet shows on hand only the amount of cash which was eliminated from petitioner's assets, and as notes payable of \$7,500 were also eliminated without appearing as a liability of the partnership, we readily infer that the \$8,000 recorded as partners' investments were provided by this cancellation and the \$500 account payable by Rogers.

It is true, as petitioner argues, that cancellation increased assets in a bookkeeping sense as did also the note for \$89,378.35. But as the note itself was paid off by earnings of the business, it seems plain that the capital contributions to the partnership and the sale price of the assets were both satisfied by bookkeeping entries conforming to a scheme which

had no substantive effect whatever on the business. And since petitioner's officers continued as business managers, it can be said here as in *R.O.H. Hills, Inc.*, 9 T.C. 153, that:

* * * the partnership contributed absolutely nothing either in services or capital to the production of the income * * *. * * * its function and purpose were merely to siphon off the greater portion of the earnings * * *.

Cf. *Ingle Coal Corporation*, 10 T.C. 1199; *Forcum-James Co.*, 7 T.C. 1195.

Petitioner's business, it should be noted further, was unitary in character and in this respect differed from the businesses considered in *Miles-Conley Co., Inc.*, 10 T.C. 754; *Buffalo Meter Co.*, 10 T.C. 83, and *Seminole Flavor Co.*, 4 T.C. 1215. In those cases recognition for tax purposes was accorded the individual proprietorship or the partnership formed by the taxpayer's shareholders for operating a severable branch of the corporation's activities. But petitioner's building supply business was not susceptible of any logical division. The real estate, to which petitioner retained title, was essential to its conduct and continued to be used in it under the form of a lease. In this respect petitioner's position is analogous to that of the taxpayer in *Broadway Strand Theatre Co.*, 12 B.T.A. 1052, wherein the Board rejected the shareholder's contention that profits of theater operation were his individual income although he had transacted business under his own name.

Petitioner properly contends, however, that even in the absence of a business purpose quoad itself as a corporation, the partnership should be recognized if its formation served the interests of its individual shareholders. *Miles-Conley Co., Inc.*, *supra*. Several personal reasons for the change were asserted. Attorney Bryson testified that Scharpf felt entitled to a more substantial interest in the business than that represented by his 35.3 shares and wished the partnership as a means of getting that interest while Rogers opposed, fearing the unlimited liability and the possibility that Scharpf would want to take in his sons. Scharpf himself said that he wanted a partnership "so that I would have a decent share of the profit"; also that under such a form of organization he could get out more readily. He expected Rogers to have a half interest, but Rogers decided to take his wife in also because, in his own words, "although I was the only member of the corporation, still it was a family affair."

This testimony, in our opinion, affirmatively supports the respondent's view that the purpose of the partnership was to achieve a reallocation of income among family groups. The result was certainly accomplished, for the interests of the three shareholders were equally divided among the four spouses. Compensation was paid for services rendered by the partners, and their note for assets was paid from future business earnings. As above shown, there was no new capital; no new services, no change in business. The only real result of the change was a

new distribution of profits, and the Commissioner was correct in refusing to recognize it for tax purposes.

This disposition makes it unnecessary to consider an application of section 45 and as all business profits are taxable to petitioner, there was no recognizable net operating loss in 1941 which should be carried over. We do not believe, however, that petitioner's officers showed a lack of prudence in failing to file excess profits tax returns for 1943 and 1944, but on the contrary that they honestly deemed the partnership recognizable for tax purposes. Since no excess profits tax returns were required under that view, they had reasonable cause for not filing any. Imposition of the penalties is not sustained. *Hugh Smith, Inc.*, 8 T.C. 660; *Estate of Frederick C. Kirchner*, 46 B.T.A 578.

Decision will be entered under Rule 50.

[Seal]

Entered Mar. 23, 1949.

Received T.C.U.S. March 17, 1949.

[Title of Tax Court and Cause.]

MOTION FOR RECONSIDERATION AND FOR
REVIEW BY THE ENTIRE COURT

The above-named petitioner, by its counsel, Ralph R. Bailey and Carl E. Davidson, hereby moves the Court that the Court reconsider its memorandum

findings of fact and opinion heretofore entered in the above-entitled case, and that the said memorandum findings of fact and opinion be reviewed by the entire court.

Memorandum setting forth the basis of this motion is filed herewith.

/s/ RALPH R. BAILEY,
723 Pittock Block,
Portland, Oregon.

/s/ CARL E. DAVIDSON,
1525 Yeon Building,
Portland, Oregon.

Counsel for Petitioner.

Served Apr. 27, 1949.

Received and filed T.C.U.S. April 19, 1949.

Denied April 25, 1949.

[Title of Tax Court and Cause.]

ORDER

The motion of the petitioner filed on April 19, 1949, insofar as it asks review by the full Court, is hereby denied.

[Seal] /s/ BOLON B. TURNER,
Presiding Judge.

Dated: Washington, D. C., April 26, 1949.

Served Apr. 27, 1949.

[Title of Tax Court and Cause.]

RESPONDENT'S COMPUTATION FOR
ENTRY OF DECISION

The attached proposed computation is submitted, on behalf of the respondent, to the Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Tax Court, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Tax Court, pursuant to the statutes in such cases made and provided.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

WILFORD H. PAYNE,
Division Counsel.

JOHN H. PIGG,
Special Attorney,
Bureau of Internal Revenue.

C-TS:NWD:RECOMP.

P:JHP:MHB

Audit Statement

Petitioner: Twin Oaks Company
669 High Street
Eugene, Oregon

Docket No.: 16845

Tax Liability for the Taxable Years Ended December 31, 1942,
December 31, 1943 and December 31, 1944

Year	Declared Value Liability	Excess-Profits Tax Assessed	Deficiency
1942	\$ 373.11	\$ none	\$ 373.11
1943	3,778.43	none	3,778.43
1944	6,565.25	none	6,565.25
Totals	<u>\$10,716.79</u>	<u>\$ none</u>	<u>\$10,716.79</u>

	Income Tax		
1942	\$ 1,394.61	\$ none	\$ 1,394.61
1943	3,305.23	184.85	3,120.38
1944	4,672.53	139.85	4,532.68
Totals	<u>\$ 9,372.37</u>	<u>\$324.70</u>	<u>\$ 9,047.67</u>

	Excess Profits Tax		
1943	\$11,311.08	\$ none	\$11,311.08
1944	24,562.88	none	24,562.88
Totals	<u>\$35,873.96</u>	<u>\$ none</u>	<u>\$35,873.96</u>

Recomputation of tax liability prepared in accordance with
the memorandum opinion of The Tax Court of the United States
entered March 23, 1949.

Taxable Year Ended December 31, 1942

Schedule 1

Adjustment to Income

Net income disclosed by deficiency letter dated October 3, 1947	\$ 5,951.57
Net income as adjusted pursuant to the memorandum opinion of The Tax Court of the United States en- tered March 23, 1949.....	5,951.57
Adjustment	No Change

Schedule 2

Computation of Tax

Declared value excess-profits tax liability disclosed by deficiency letter	\$ 373.11
Declared value excess-profits tax assessed:	
Original account No. NC 41023.....	none
Deficiency in declared value excess-profits tax.....	\$ 373.11
Income tax liability disclosed by deficiency letter.....	\$ 1,394.61
Income tax assessed:	
Original account number NC 41023.....	none
Deficiency in income tax.....	\$ 1,394.61

Taxable Year Ended December 31, 1943

Schedule 3

Adjustment to Income

Net income disclosed by deficiency letter dated October 3, 1947	\$29,874.50
Net income as adjusted pursuant to the memorandum opinion of The Tax Court of the United States en- tered March 23, 1949.....	29,874.50
Adjustment	No Change

Schedule 4
Computation of Tax

Declared Value Excess-Profits Tax

Declared value excess-profits tax disclosed by deficiency letter	\$ 3,778.43
Declared value excess-profits tax assessed:	
Original account number 420506.....	none

Deficiency in declared value excess-profits tax.....	\$ 3,778.43
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Income Tax

Income tax liability disclosed by deficiency letter.....	\$ 3,305.23
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Income tax assessed:

Original account number 420506.....	184.85
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Deficiency in income tax.....	\$ 3,120.38
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Excess Profits Tax

Excess profits tax disclosed by deficiency letter.....	\$11,311.08
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Excess profits tax assessed (no return filed).....	none
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Deficiency in excess profits tax.....	\$11,311.08
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Pursuant to the opinion of The Tax Court of the United States, the petitioner is not liable for a delinquency penalty for failure to file an excess profits tax return.

Taxable Year Ended December 31, 1944

Schedule 5
Adjustment to Income

Net income disclosed by deficiency letter dated

October 3, 1947	\$52,978.44
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Net income as adjusted pursuant to the memorandum

opinion of The Tax Court of the United States en-

tered March 23, 1949.....	52,978.44
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Adjustment	No Change
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Schedule 6
Computation of Tax

Declared Value Excess-Profits Tax

Declared value excess-profits tax disclosed by

deficiency letter	\$ 6,565.25
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Declared value excess-profits tax assessed:

Original account number 4200582.....	none
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Deficiency in declared value excess-profits tax.....	\$ 6,565.25
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Income Tax

Income tax liability disclosed by deficiency letter.....	\$ 4,672.53
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Income tax assessed:

Original account number 4200582.....	139.85
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Deficiency in income tax.....	\$ 4,532.68
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Excess Profits Tax

Excess profits tax disclosed by deficiency letter.....	\$24,562.88
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Excess profits tax assessed:

Original account number (no return filed).....	none
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Deficiency in excess profits tax.....	\$24,562.88
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Pursuant to the opinion of The Tax Court of the United States, the petitioner is not liable for a delinquency penalty for failure to file an excess profits tax return.

Received and Filed T.C.U.S. May 12, 1949.

[Title of Tax Court and Cause.]

PETITIONER'S COMPUTATION FOR ENTRY OF DECISION

The attached proposed computation is submitted on behalf of the petitioner to The Tax Court of the United States in compliance with its opinion determining the issues in this proceeding.

This computation is submitted without prejudice to the petitioner's right to contest the correctness of the decision entered herein by The Tax Court, pursuant to the statutes in such cases made and provided.

In its memorandum of facts and opinion the Court made two ultimate findings of fact, namely:

(1). That titles to all of the assets theretofore issued by the petitioner in its business with the exception of its real property were transferred to John J. Rogers, Corabelle M. Rogers, Louis C. Scharpf and Eva M. Scharpf, and said assets were used by them in the conduct of business previously carried on by the corporation, and

(2). The re-allocation of income resulting from transfer to the partnership and carrying on by the partnership of its business may not be recognized for tax purposes and all of the income of the business is therefore to be attributed to the corporation.

In view of these conflicting ultimate findings we are attaching hereto alternative computations under each of the said findings.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,

Counsel for Petitioner.

Copy served 5/18/49.

Recomputation Statement

Petitioner,
Twin Oaks Company.

Docket No. 16845.

(1). Recomputation of tax under alternative finding of fact (1) :

Year	Income	Declared Value Excess	Excess	Penalties
	Tax	Profits Tax	Profits Tax	
1942	0	0	0	0
1943	0	0	0	0
1944	0	0	0	0

(2). Recomputation of tax under alternative finding of fact (2) :

Year	Income	Declared Value Excess	Excess	Penalties
	Tax	Profits Tax	Profits Tax	
1942	1394.61	373.11	0	0
1943	3835.12	3778.43	8928.61	0
1944	5926.03	6565.25	20,311.49	0

Computations upon which deficiencies under alternative finding of fact (2) are attached hereto as Exhibit A hereof. If computation of deficiencies is made under alternative finding of fact (2), the respondent moves that the Court order the respondent to credit against the said deficiencies the amounts of income tax paid on income of the partnership in excess of the amounts allowed by the respondent as salaries.

EXHIBIT A-1.

Twin Oaks Company

Summary of Federal Income and Excess Profits Taxes and Deficiencies

Income tax—	Recomputed	Assessed	Deficiency
	Liability		
1942	1,394.61	None	1,394.61
1943	4,019.97	184.85	3,835.12
1944	6,065.88	139.85	5,926.03
	<hr/> 11,480.46	<hr/> 324.70	<hr/> 11,155.76

Declared value excess-profits tax—			
1942	373.11	None	373.11
1943	3,778.43	None	3,778.43
1944	6,565.25	None	6,565.25
	<hr/> 10,716.79	<hr/> None	<hr/> 10,716.79

Federal excess profits tax—

1942	None	None	None
1943	8,928.61	None	*8,928.61
1944	20,311.49	None	20,311.49
	<u>29,240.10</u>	<u>None</u>	<u>29,240.10</u>
Total	<u>\$51,437.35</u>	<u>\$324.70</u>	<u>\$51,112.65</u>

* Additional \$150.70 to be allowed by Collector for balance of post-war refund not eliminated by credit for debt retirement.

EXHIBIT A-2.

Twin Oaks Company

Computation of 1942 Federal Income and Excess Profits Taxes

Net Income for the Year:

Income transferred from Twin Oaks Builders Supply Co.	18,525.29
Add—Income reported by Twin Oaks Company on return filed, before net operating loss deduction.....	656.28
	<u>19,181.57</u>

Less—Salaries to John J. Rogers and

Louis C. Sharpf 13,200.00

—Long-term capital loss shown on return filed by Twin Oaks Company used as off- set against \$621.63 long-term capital gain transferred from partnership.....	30.00	13,230.00
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Net income for declared value excess-profits tax..... 5,951.57

Less—Declared value excess profits tax, as below..... 373.11

Net income..... 5,578.46

Less—Income subject to excess profits tax..... None

Normal tax net income, regular method..... 5,578.46

Less—Long-term capital gain..... 591.63

Normal tax net income, alternative computation..... \$ 4,986.83

Income and Declared Value Excess Profits Tax:		Income	Tax
Declared value excess profits tax—			
Net income as above.....	5,951.57		
Less—10% of \$25,000.00 declared value of capital stock	2,500.00		
	<u>3,451.57</u>		
Subject to tax.....	\$ 3,451.57		
	<u>1,250.00</u>	82.50	
Taxable at 6.6%.....	1,250.00		
Taxable at 13.2%.....	2,201.57		290.61
	<u>3,451.57</u>		<u>373.11</u>
Subject to tax and tax thereon, also deficiency	\$ 3,451.57	\$	373.11
Combined normal tax and surtax—			
Alternative tax computation—25% of \$5,578.46			
normal tax net income, also deficiency.....	\$ 1,394.61		
Excess Profits Tax:			
Net income after declared value excess profits tax.....		5,578.46	
Add—50% of \$638.84 interest on borrowed capital.....		319.42	
		<u>5,897.88</u>	
Less—Long-term capital gain.....		591.63	
		<u>5,306.25</u>	
Excess profits net income.....			5,306.25
Less—Specific exemption	5,000.00		
—Excess profits credit.....	10,282.16		15,282.16
	<u>10,282.16</u>		<u>None</u>
Adjusted excess profits net income.....			
Excess profits credit as above.....	10,282.16		
Less—Excess profits net income as above.....	5,306.25		
	<u>4,975.91</u>		
Unused excess profits credit and carryback to year 1941.....	\$ 4,975.91		

EXHIBIT A-3.

Twin Oaks Company

Computation of 1943 Federal Income and Excess Profits Taxes

Net Income for the Year:

Net income per return filed by Twin Oaks Company before deduction of \$248.55 net operating loss deduction..	987.98
Add—Net income of Twin Oaks Builders Supply Co. per return filed	42,086.52
	<u>43,074.50</u>
Less—Salaries of John J. Rogers and Louis C. Scharpf.....	13,200.00
Net income as adjusted.....	<u><u>\$29,874.50</u></u>

Declared Value Excess-Profits Tax:

	Amount	Tax
Net income as above.....	29,874.50	
Less—10% of \$10,000.00 declared value of capital stock	1,000.00	
Balance subject to tax	<u>\$28,874.50</u>	
Taxable at 6.6% (5% of \$10,000.00).....	500.00	33.00
Taxable at 13.2 %.....	28,374.50	3,745.43
Total, also deficiency in tax.....	<u><u>\$28,874.50</u></u>	<u><u>\$ 3,778.43</u></u>

Normal Tax and Surtax:

Net income for declared value excess-profits tax	29,874.50	
Less—Declared value excess-profits tax	3,778.43	
—Income subject to excess profits tax as below.....	10,836.92	14,615.35
Normal and surtax net income.....	<u>\$15,259.15</u>	
Taxable at 25%.....	5,000.00	1,250.00
Taxable at 27%.....	10,259.15	2,769.97
Total	<u><u>\$15,259.15</u></u>	<u><u>4,019.97</u></u>
Less—Assessed on return filed.....		184.85
Deficiency		<u><u>\$ 3,835.12</u></u>

Excess Profits Tax:

Net income as above.....	29,874.50	
Less—Declared value excess-profits tax.....	3,778.43	
Adjusted net income	26,096.07	
Add—50% of \$58.31 interest on borrowed capital	29.16	
Excess profits net income.....	26,125.23	
Less—Specific exemption	5,000.00	
—Excess profits credit.....	10,288.31	15,288.31
Adjusted excess profits net income.....	\$10,836.92	
Tax thereon at 90%.....		9,753.23
Less—Credit for debt retirement—40% of \$2,061.54		824.62
Excess profits tax due, also deficiency.....		\$ 8,928.61

EXHIBIT A-4

Twin Oaks Company

Computation of 1944 Federal Income and Excess Profits Taxes

Net Income for the Year:

Net income per return filed by Twin Oaks Company.....	559.42
Add—Net income of Twin Oaks Builders Supply Co. per return filed.....	65,619.02
	66,178.44
Less—Salaries of John J. Rogers and Louis C. Scharpf.....	13,200.00
Net income as adjusted including \$116.67 net long-term capital gain.....	\$52,978.44

Declared Value Excess-Profits Tax:

	Amount	Tax
Net income as above.....	52,978.44	
Less—Long-term capital gain.....	116.67	
—10% of \$25,000.00 declared value of capital stock.....	2,500.00	2,616.67
Balance subject to tax.....	\$50,361.77	
Taxable at 6.6% (5% of \$25,000.00).....	1,250.00	82.50
Taxable at 13.2%.....	49,111.77	6,482.75
Total, also deficiency in tax.....	\$50,361.77	\$ 6,565.25

Normal Tax and Surtax:

Alternative computation—

Net income as above.....	52,978.44	
Less—Net long-term capital gain..	116.67	29.17
—Declared value excess-		
profits tax	6,565.25	
—Income subject to excess		
profits tax as below.....	23,756.13	30,438.05
Normal and surtax net income.....	\$22,540.39	
Taxable at 25%.....	5,000.00	1,250.00
Taxable at 27%.....	15,000.00	4,050.00
Taxable at 29%.....	2,540.39	736.71
Total—	\$22,540.39	6,065.88
Less—Assessed on return filed.....		139.85
Deficiency		\$ 5,926.03

Excess Profits Tax:

Net income as above.....	52,978.44	
Less—Declared value excess-profits tax	6,565.25	
Adjusted net income.....	46,413.19	
Add—50% of interest on borrowed capital.....	None	
	46,413.19	
Less—Long-term capital gain.....	116.67	
Excess profits net income.....	46,296.52	
Less—Specific exemption	10,000.00	
—Excess profits credit.....	12,540.39	22,540.39
Adjusted excess profits net income and		
tax at 95% thereof.....	\$23,756.13	22,568.32
Less—Current credit at 10%.....		2,256.83
Excess profits tax, also deficiency in tax.....		\$20,311.49

EXHIBIT A-5.

Twin Oaks Company

Analysis of Partners' Capital Investment Accounts in Twin Oaks Builders Supply Co.

Year 1941

	John J. Rogers	Corabelle M. Rogers	L. C. Seharpf	Eva M. Scharpf	Total
Jan. 1 Balance	2,000.00	2,000.00	2,000.00	2,000.00	8,000.00
Dec. 31 Shares of income.....	10,594.05	4,294.05	10,594.05	4,294.05	29,776.20
Total	12,594.05	6,294.05	12,594.05	6,294.05	37,776.20
Withdrawals	6,600.00	300.00	6,600.00	300.00	13,800.00
Balance	5,994.05	5,994.05	5,994.05	5,994.05	23,976.20

Year 1942

Dec. 31 Shares of income.....	7,781.33	1,481.32	7,781.32	1,481.32	18,525.29
Total	13,775.38	7,475.37	13,775.37	7,475.37	42,501.49
Withdrawals	7,913.50	1,613.50	7,913.50	1,613.50	19,054.00
Balance	5,861.88	5,861.87	5,861.87	5,861.87	23,447.49

Twin Oaks Company vs.

Year 1943

Dec. 31

Shares of income.....	13,671.63	7,371.63	13,671.63	7,371.63	42,086.52
Total	19,533.51	13,233.50	19,533.50	13,233.50	65,534.01
Withdrawals	9,220.75	2,920.74	9,220.74	2,920.74	24,282.97
Balance	10,312.76	10,312.76	10,312.76	10,312.76	41,251.04

Year 1944

Dec. 31

Shares of income.....	19,554.76	13,254.75	19,554.76	13,254.75	65,619.02
Total	29,867.52	23,567.51	29,867.52	23,567.51	106,870.06
Withdrawals	15,950.00	9,650.00	15,950.00	9,650.00	51,200.00
Balance	\$13,917.52	\$13,917.51	\$13,917.52	\$13,917.51	\$55,670.06

EXHIBIT A-6.

Twin Oaks Company

Summary Balance Sheets as at December 31, 1941, 1942, and 1943

Summary balance sheets give effect to consolidation of the December 31 balance sheets of Twin Oaks Company and Twin Oaks Builders Supply Co. as set out on the corporation's income tax return and the partnership return of income filed for each of the calendar years 1941, 1942, and 1943. Such consolidated figures, besides eliminating the balance shown as owing to Twin Oaks Company by Twin Oaks Builders Supply Co. have been adjusted only to reflect the adjusted accumulated earnings and surplus as per the attached schedule and to reflect as an advance to stockholders the excess of amounts withdrawn by them over the \$13,200.00 as total of annual salaries of John J. Rogers and Louis C. Scharpf. The summary consolidated balance sheets are set out as follows:

Assets	12-31-41	12-31-42	12-31-43
Cash on hand and in banks.....	1,349.15	1,175.54	10,639.45
Accounts and notes receivable.....	39,223.55	13,336.72	25,295.07
Merchandise inventory	71,308.78	62,931.92	70,804.31
Investments	200.00	100.00	2,100.00
Land	30,209.57	30,209.57	32,709.57
Depreciable assets at net book value	16,287.44	15,694.70	16,077.90
Deferred charges	188.65	356.59	286.14
Advances to stockholders.....	600.00	6,454.00	17,536.97
Total assets	<u>\$159,367.14</u>	<u>\$130,259.04</u>	<u>\$175,449.41</u>
Liabilities and Capital			
Accounts payable	11,313.59	1,670.20	20,529.12
Notes payable	25,641.84	2,061.54	
Accrued taxes	1,460.66	570.68	220.02
Total liabilities	<u>38,416.09</u>	<u>4,302.42</u>	<u>20,749.14</u>
Capital stock	94,600.00	94,600.00	94,600.00
Contribution to capital	8,000.00	8,000.00	8,000.00
Accumulated earnings and profits	18,351.05	23,356.62	52,100.27
Total capital	<u>120,951.05</u>	<u>125,956.62</u>	<u>154,700.27</u>
Total liabilities and capital....	<u>\$159,367.14</u>	<u>\$130,259.04</u>	<u>\$175,449.41</u>

EXHIBIT A-7.

Twin Oaks Company

Summary of Excess Profits Tax Credit Based on Invested Capital

	Year 1942	Year 1943	Year 1944
Equity invested capital at beginning of the taxable year—			
Money paid in for stock.....	94,600.00	94,600.00	94,600.00
Contribution of capital, being original investments of partners to capital of Twin Oaks Builders Supply Co. added pursuant to decision of Court	8,000.00	8,000.00	8,000.00
25% of new capital contributed on above basis.....	2,000.00	2,000.00	2,000.00
Accumulated earnings and profits as per summary thereof and as per attached balance sheets	18,351.05	23,356.62	52,100.27
Average equity invested capital	122,951.05	127,956.62	156,700.27
Average borrowed invested capital, being 50% of average borrowed capital per schedules thereof.....	5,575.95	647.30	54.65
Invested capital	<u>\$128,527.00</u>	<u>\$128,603.92</u>	<u>\$156,754.92</u>
Excess profits credit—			
8% thereof	<u>\$ 10,282.16</u>	<u>\$ 10,288.31</u>	<u>\$ 12,540.39</u>

EXHIBIT A-8.

Twin Oaks Company

Accumulated Earnings and Profits of Twin Oaks Company at
December 31, 1941, 1942, and 1943

	Accumulated Earnings and Profits as at		
	12-31-41	12-31-42	12-31-43
Net income of partnership reported on Form 1065 by Twin Oaks Builders Supply Co. less salaries of John J. Rogers and Louis C. Scharpf in the total amount of \$13,200.00 in each year—			
Year 1941 (\$29,776.20 less \$13,200.00)	16,576.20	16,576.20	16,576.20
Year 1942 (\$18,525.29 less \$13,200.00)		5,325.29	5,325.29
Year 1943 (\$42,086.52 less \$13,200.00)			28,886.52
Adjustment to 1936 R.A.R. in re depreciation credited to surplus in 1942	212.76		
Adjustment of 1942 capital stock tax charged to surplus in 1942.....	*1.25		
Net increase in accumulated earnings and profits of Twin Oaks Company.....	16,787.71	21,901.49	50,788.01
Add—Accumulated earnings and surplus of Twin Oaks Company per corporation's income tax returns filed.....	1,563.34	1,455.13	1,312.26
Accumulated earnings and profits as adjusted, under second alternative calculation	\$18,351.05	\$23,356.62	\$52,100.27

* Figures in red.

EXHIBIT A-9.

Twin Oaks Company

Computation of Average Borrowed Capital (.00 omitted), Page 1

Year 1942	Date	Changes		Balance	Days	Amount
		Decrease	Increase			
Note, Robert Ross Rogers	1- 1			100	230	23,000
	8-18	100		None		
Note, Jack Rogers	1- 1			700	230	161,000
	8-18	700		None		
Note, George L. Scharpf	1- 1			2,471	230	568,330
	8-18	471		2,000	32	64,000
	9-19	2,000		None		
Note, Wm. L. Scharpf	1- 1			2,473	230	568,790
	8-18	473		2,000	4	8,000
	8-22	1,000		1,000	32	32,000
	9-23	1,000		None		
Note, The First National Bank of Eugene	1- 1			17,500	13	227,500
	1-13	1,000		16,500	2	33,000
	1-15	1,000		15,500	1	15,500
	1-16	1,250		14,250	1	14,250
	1-17	1,000		13,250	9	119,250

Date	Changes Decrease	Increase	Balance	Days	Amount
1-26	750		12,500	44	550,000
3-11		2,500	15,000	8	120,000
3-19		2,000	17,000	6	102,000
3-25	3,000		14,000	6	84,000
3-31	1,000		13,000	21	273,000
4-21	1,500		11,500	2	23,000
4-23	1,500		10,000	2	20,000
4-25	4,000		6,000	4	24,000
4-29		1,000	7,000	2	14,000
5- 1		500	7,500	11	82,500
5-12	1,500		6,000	2	12,000
5-14	800		5,200	7	36,400
5-21	800		4,400	2	8,800
5-23	400		4,000	4	16,000
5-27	500		3,500	2	7,000
5-29	600		2,900	14	40,600
6-12	2,900		None		
Carried forward—					3,247,920

EXHIBIT A-10.

Twin Oaks Company

Computation of Average Borrowed Capital (.00 omitted), Page 2

Year 1942	Date	Changes		Balance	Days	Amount
		Decrease	Increase			
H.O.L.C. Loan	Brought forward—					
	1- 1			2,398	26	3,247,920
	1-26	26		2,372	30	62,348
	2-25	26		2,346	30	71,160
	3-27	26		2,320	45	70,380
	5-11	26		2,294	30	104,400
	6-10	26		2,268	27	68,820
	7- 7	26		2,242	31	61,236
	8- 7	26		2,216	25	69,502
	9- 1	26		2,190	31	55,400
	10- 2	26		2,164	32	67,890
	11- 3	26		2,138	1	69,248
	11- 4	23		2,115	28	2,138
	12- 2	27		2,088	29	59,220
	12-31	26		2,062		60,552
Total—						<u>\$4,070,214</u>
Average borrowed capital—1/365 thereof						<u>\$ 11,152</u>
Average borrowed invested capital—50% thereof						<u>\$ 5,576</u>

Year 1943
H.O.L.C. Loan

Date	Changes		Balance	Days	Amount
	Decrease	Increase			
1- 1			2,062	30	61,860
1-30	27		2,035	30	61,050
3- 1	27		2,008	29	58,232
3-30	27		1,981	32	63,392
5- 1	27		1,954	31	60,574
6- 1	27		1,927	30	57,810
7- 1	27		1,900	39	74,100
8- 9	26		1,874	19	35,606
8-28	1,874		None		

Total—

\$ 472,624

Average borrowed capital—1/365 thereof

\$ 1,295

Average borrowed invested capital—50% thereof

\$ 647

Year 1944
Note, The First National
Bank of Eugene

12-27 10,000 10,000 4

\$ 40,000

Average borrowed capital—1/366 thereof

\$ 109

Average borrowed invested capital—50% thereof

\$ 55

Filed: T.C.U.S. May 16, 1949.

[Title of Tax Court and Cause.]

AFFIDAVIT OF CARL E. DAVIDSON IN
SUPPORT OF PETITIONER'S COMPU-
TATION FOR ENTRY OF DECISION
UNDER RULE 50

State of Oregon,
County of Multnomah—ss.

I, Carl E. Davidson, being first duly sworn, upon my oath, do say that:

I am one of counsel of record for the petitioner in the above-entitled proceeding, and that petitioner's computation for entry of decision under Rule 50 heretofore filed in this proceeding was prepared under my direction and supervision.

The recomputation of tax under alternative finding of fact (1) contained in the said computation was computed upon the basis of the findings of fact of the court as set forth in its memorandum findings of fact and opinion. The said computation was based upon the finding by the court that the title to the property employed in the business of Twin Oaks Builders Supply Co. as its inventory was transferred by the petitioner to John J. Rogers, Corabelle Rogers, Louis C. Scharpf and Eva M. Scharpf, and upon the theory that under this finding of fact the court must necessarily find that the income from property found by the court to have been transferred could not be taxed to the petitioner. The said computation under alternative finding of fact (1) is therefore computed at zero,

there being no adjustment to the petitioner's income permitted under the said finding of fact.

The petitioner's computation of penalties under alternative finding of fact (2) is based upon the court's finding of fact in its memorandum findings of fact and opinion.

Petitioner's recomputation of tax under alternative findings of fact (2) has been prepared upon the basis of the findings and opinion of the court that the income of the partnership of Twin Oaks Builders Supply Co. for the years 1942, 1943 and 1944 was taxable in its entirety to the petitioner after allowance of \$13,200.00 for officers' salaries for each of the years involved, treating long term capital gains received by the partners of Twin Oaks Builders Supply Co. as the income of the petitioner, and allowing contributions in the amount of \$500.31 made by the partners of Twin Oaks Builders Supply Co. as a deduction for the petitioner, all as set forth in detail in the notice of deficiency, a copy of which is attached to the petition. The net results of the said adjustment as to deficiencies are set forth in the memorandum findings of fact and opinion of the court. Petitioner's computations of deficiencies under alternative findings of fact (2) are explained in the following numbered paragraphs in order that they may be reconciled by the court with the deficiencies asserted by the respondent. Petitioner does not acquiesce in such computation and contends that the said finding is erroneous.

(1). Petitioner's computation of deficiencies of income tax and declared value excess profits tax under alternative findings of fact (2) for the year 1942 are the same as those determined by the respondent in his notice of deficiency and included by the court in its memorandum findings of fact and opinion.

(2). Deficiency in declared value excess profits tax in the amount of \$3778.43 for the year 1943 included by petitioner in recomputation of tax under alternative findings of fact (2) is the same as the deficiency determined by the respondent in his notice of deficiency, and in the court's memorandum findings of fact and opinion.

(3). For the year 1943 the respondent has determined deficiencies of \$3120.38 in petitioner's income tax and \$11,311.08 in the petitioner's excess profits tax, whereas the petitioner in its recomputation of tax under alternative findings of fact (2) has computed these deficiencies as \$3835.12 in income tax and \$8928.61 in excess profits tax. The differences between the computations of the petitioner and those of the respondent as to income and excess profits taxes are the result of the respondent using an excess profits tax credit based upon the assumption that there were no earnings and profits accumulated by the corporation in the year 1942, and by the failure of the respondent to add to invested capital for each of the years 1942, 1943 and 1944, the additional capital put into the business, the income of which under alternative findings of fact (2) is held to be the income of the corporation, and by the

further failure of the respondent to allow credit for borrowed invested capital for the years 1942, 1943 and 1944. The petitioner has also included in this recomputation addition to invested capital resulting from adjustments made by the revenue agent's report for the year 1936 in the amount of \$212.76, and adjustment in reduction of surplus by additional capital stock tax in the amount of \$1.25. The petitioner is entitled to use the invested capital method for computation of its excess profits tax credit for the years 1942, 1943 and 1944. In the calendar year 1941, the net increase of the petitioner's earnings and profits under the theory that all of the income of Twin Oaks Builders Supply Co. was taxable to the petitioner, the petitioner had accumulated earnings and profits at the end of the year 1941 in the amount of \$18,351.05 made up of accumulated earnings and profits of the petitioner as shown on its income tax return and books, plus \$16,576.20 additional accumulated earnings and profits of the petitioner upon the theory that all income of Twin Oaks Builders Supply Co., a partnership, was taxable to the petitioner, plus adjustment in 1936 revenue agent's report in the amount of \$212.76, less adjustment of \$1.25 in capital stock tax charged to surplus, all as set forth in more detail in Exhibit A-8 attached to the petitioner's computation for entry of decision under Rule 50. The respondent has not allowed any accumulated earnings and profits at the end of 1941, 1942 and 1943, in the face of the concession of respondent's counsel at trial (Transcript, Pages 4-5) that if the income was taxable to the cor-

poration, the partners of Twin Oaks Builders Supply Co. might properly claim refund of taxes paid by them individually on such income. The respondent's computation in denying the accumulated earnings and profits is based upon the apparent theory that notwithstanding his action in asserting that the entire income from the business was taxable to the petitioner, the same income was distributed to the partners of Twin Oaks Builders Supply Co. and is taxable to them. As shown on Exhibit A-10, attached to petitioner's computation for entry of decision, petitioner should be credited for invested capital purposes with borrowed invested capital in the amount of \$11,152.00 for the year 1942, fifty per cent thereof allowable being \$5576.00. The said borrowed capital constituted borrowings by the partnership of Twin Oaks Builders Supply Co. and if the income from the business is taxable to the petitioner then petitioner is entitled to invested capital credit based upon the borrowings made for the business. In its memorandum findings of fact and opinion the court has found that, "No additional funds were paid in as operating capital." The court has further found that the petitioner was indebted to the partners of Twin Oaks Builders Supply Co. in the amount of \$7500.00, which item appeared on the books of the petitioner prior to the formation of the partnership as a liability. This amount, plus \$500.00 paid in, should therefore be regarded for purposes of calculation of excess profits tax credit under this alternative as new capital of the petitioner, and credit therefor as shown on

Exhibit A-7 attached to petitioner's recomputation should be given.

(4). For the year 1944 the petitioner's computation of income and excess profits tax under alternative findings of fact (2) are respectively, \$5926.03 income tax, and \$20,311.49 excess profits tax, whereas the respondent in his notice of deficiency has computed a deficiency in income tax of \$4532.68, and a deficiency in excess profits tax of \$24,562.88. The differences in these computations are the result of the failure of the respondent to allow excess profits tax based upon invested capital including accumulated earnings and profits, borrowed invested capital, and new capital as set forth more fully in the exhibits attached to petitioner's recomputation of tax.

(5). The court, in its memorandum findings of fact and opinion, has determined that the petitioner had reasonable cause for failing to file excess profits tax returns. In further support of such determination, it is called to the attention of the court that without the inclusion of income from operation of the business the petitioner was a personal holding company and not subject to excess profits taxes, and that the petitioner filed personal holding company returns for the years involved.

/s/ CARL E. DAVIDSON.

Subscribed and sworn to before me this 24th day of June, 1949.

[Seal] /s/ ROSE W. SHENKER,

Notary Public for Oregon.

My Commission expires: Dec. 9, 1951.

Filed T.C.U.S. June 29, 1949.

The Tax Court of the United States

Docket No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

June 29, 1949

(Met, pursuant to notice at 12:20 o'clock,
p.m.)Before: Hon. Luther A. Johnson,
Judge.

Appearances:

J. F. CONDON, JR.,

52 Wall Street,

New York 5, New York,

appearing on behalf of Petitioner.

R. C. WHITLEY,

Bureau of Internal Revenue,

appearing for the Respondent.

PROCEEDINGS

The Clerk: Docket Number 16845, Twin Oaks
Company.Mr. Whitley: If your Honor please, this comes
up on a rule 50 settlement, based on an opinion
of the Court entered March 23, 1949.

The Court: Is the opinion of the Court here available? All right, I have it, thank you.

Mr. Whitley: In that opinion—I am going to be brief—the Court decided that on page 15 of that opinion which is a mimeographed copy—

The Court: Yes.

Mr. Whitley: —after discussing the testimony, the Court concluded that the only real result of the charge was a new distribution of the profits and the Commission was correct in refusing to recognize it for tax purposes, speaking of the Corporation, which the Respondent taxed by reason of the ground a partnership was not bona fide for tax purposes.

Then, the result was the Court says the Commissioner was correct in determining that the Corporation was taxable. One thing the Court did say the Commissioner was wrong in was inserting the 25 per cent penalty. We filed our computation on that ground showing the deficiencies as set forth in the deficiency notice.

The Petitioner has filed an alternative, and he has taken some exceptions to the computations, just what they are he will tell you in detail, but they have to do with an excess profits tax and a carryback loss, and certain things I think have something to do with the rule of the hearing. That is the Respondent's position. We have followed the opinion of the Court.

The Court: All right. We will hear from Petitioner's counsel.

Mr. Condon: If your Honor please, this is my

first appearance in this case. The only thing we have in controversy, the only thing involved is one of dollars, and how the tax liability under your Honor's decision should be computed.

We filed a detailed computation, and we would also like to file these additional affidavits explaining certain factors in connection with the computation.

The Court: Pardon me, is this just original and two copies?

Mr. Condon: Original and two copies, yes, sir.

For the year, 1942, there is no dispute between us and the Commission about his computation. For the year 1943, we have a lesser income tax and a lesser excess profits tax. The difference is in the case of the income tax of approximately \$700 and in the case of the excess profits tax a difference of about \$2500.

For the year 1944, the petitioner claims that the income tax is greater than computed by the Commissioner, but that the excess profits tax is \$5,000 less than computed by the Commissioner. These are just round numbers to give you the estimate of the situation.

With respect to declared excess value profits tax, the computation, there is no dispute.

We come down to certain things. In your Honor's decision, that the Commissioner has not taken into consideration in making the computation. For instance, the officer's salaries, is one. Contributions, \$500.31.

The Commissioner has wholly failed to take into consideration in his computation any question of earnings and profits accumulated by the Corporation in the year 1942, and the failure to pay through the invested capital of the petitioner for each of the years '42, '43, '44. The additional capital put in the business, the income of which is held to be income under the decision of the corporation. There was no credit for borrowing invested capital for any of the years. There is a slight adjustment of \$212.76, and another adjustment of \$1.25, which are unnecessary to comment on, but are covered in this affidavit.

Now, another thing: the petitioner had accumulated earnings and profits at the end of 1941 of \$18,351.05. Then, by carrying those along, we get the tax that has been computed on the basis of an invested capital basis.

Now, I was talking to counsel yesterday who is a very competent gentleman. He tells me that the Commissioner's computation is based on average earnings. I want to point out particularly that the tax payer never filed excess profits tax returns for the years in question because under the Petitioner's theory they were a personal holding company. They did file, and the record shows, they filed personal holding company returns.

Now, Petitioner has not made an election as to whether to elect average earnings or invested capital as the basis of the profits, and this comes up only now for the first time. We submit the Petitioner is entitled to—if that is the fact, under your Honor's

decision—and I am not going beyond your decision in any sense—that the computation we submitted with respect to the lesser amount of some \$8,000, be allowed by the Commission.

Mr. Whitley: Your Honor, I would like to make one more statement.

Briefly, we have this situation: We are considering computations required under rule 50 of the Court's Rules. The parties are in agreement as to income and declared value excess profits tax. The only difference between the parties in the computations relates to an excess profits tax for the year '42 and '43.

Mr. Condon: '43 and '44.

Mr. Whitley: '43 and '44.

Mr. Condon: Which automatically, if I may interrupt, affects the income computation.

Mr. Whitley: I take it that the Petitioner is saying now "My excess profits tax should be computed on an invested capital basis." There is no issue like that presented in the Petition. The Court never passed on it, and I want to say that in discussing this matter with the Petitioner's counsel, I think he is in error in saying we computed it on an earned income basis. I do not know what basis it was computed on. I do not know what the Petitioner reported. I do not know whether he reported any basis or not. But here is the one particular thing that is germane to this question: After the Commissioner made the determination and issues were framed and recorded and passed upon, then to come in and at-

tempt to raise any question under rule 50 having to do with an issue not before the Court, is prohibited by the Rules. He may be basing it entirely on an invested capital method; I don't know whether that is the real difference or not, but if it is, it is not permitted under the Rules.

Further, the Court has found nothing with respect to the Commissioner having refused to allow the Petitioner to compute his excess profits income on an income basis or an invested capital basis. That was not before the Court. The Court made just one finding: That the Commissioner was correct in his determination, except that he was wrong in asserting a penalty. That is the only thing here before the Court.

I understand this is a matter of Petitioner proposes to take to the Circuit Court of Appeals, but I say that has no place in this record here about an invested capital method because the Court has not been called upon to decide it. It is not a question before the Court. It can not be raised under Rule 50. The record is silent on such an issue, so far as I am able to determine.

Take the Petition, allegations of error, paragraph 4: "The Commissioner erred in indicating that conferences were held on March 28, April 9, and May 28, 1947, with respect to return of Petitioner, and that any statements were made with respect thereto"—has nothing to do with invested capital.

Secondly, the Commissioner erred in asserting delinquency penalties for the years '43 and '44. "The

Commissioner erred in indicating that the capital stock of Petitioner was owned in equal proportions by John J. Rogers and Louis C. Scharpf, and in disregarding for Federal Income Tax purposes a partnership known as Twin Oaks Builders Supply Company, and transactions between said partnership and Petitioner."

The next assignment of error: "The Commissioner erred in including in the taxable income of the Petitioner, income for the said partnership for the years '42, '43, '44. The Commissioner *error* in disallowing the net operating loss carryover from the year 1941"—

"The Commissioner erred in computing excess profits taxes on the net income of Petitioner for the years '43, and '44, and in asserting deficiencies in income taxes, declared value excess profits taxes, and excess profits taxes for the years '42, '43 and '44 in the amount set out in Exhibit A or in any other amounts."

That is all the allegation of error. Nothing in there was ever mentioned whether the Petitioner was entitled to compute his income on an invested capital method or what method. The Court was not called upon to decide that question and is not called upon to decide now, as I see it. I submit, your Honor, that the computation of the Commissioner is in accordance with the opinion of the Court in full, and there is no grounds for a deviation from that computation as expressed in the opinion of the Court.

I ask that it be approved.

Mr. Condon: If your Honor please, I know that you and counsel for the Government want to assess what you think is the proper and just tax against this Corporation, the Petitioner in this case.

In view of the circumstances you are both familiar with, this Corporation never filed an excess profits tax return. Any computation or entering of judgment against this Corporation at this time, it seems to me, should be computed on a fair and reasonable basis in accordance with the tax laws to determine its true liability in accordance with your decision. There is no statement in your decision that I could find that says: "Such and such is the correct figure." Your Honor determined the issue in controversy which was that the amounts were income to the Corporation, and that the Corporation was liable for the tax. That is what I understand your Honor's decision to be. In that case, it seems to me the true proper corporate tax, in which there is little difference relatively here, is the amount that should be entered, and it seems to me that is the purpose of Rule 50. The Commissioner, if his intention was correct, there would be no reason for us to appear here before you or submit anything. It would be an idle gesture. It is for the purpose of determining what the exact liability in accordance with your decision is; that we are here before you with respect to Rule 50, and under this I submit the Petitioner's submission with respect to that computation is correct.

Mr. Whitley: Now, one more word.

I agree with Petitioner's counsel, there are apparently no reasons to be here, if he will just point out that there is anything in the opinion of the Court that would direct the action he has taken, I would be very happy to consider it. If there is any statement or any inference in the opinion that the Petitioner should compute his excess profits tax income on an invested capital method I would be happy to see it, but I think that the Court's opinion is clearly void of such an inference. It was not before the Court. It can not be considered, and it can not be considered under rule 50. So if there was an error in computing it—I do not know that there is—I do not know what method the taxpayer is really entitled to compute his excess profits income on. I know the Commissioner determined it in the ninety-day letter. Nothing was said about it then. Nothing was said during the trial. It may be that there might be some inference that these individuals have reported from the partnership as their distributive share, and possibly they have overpaid. That has something to do with their individual liability, but that has nothing in the world to do with the question of what the excess profits tax of this Corporation are, which the Court held was a proper entity to be taxed—it has nothing to do with it, and the computation of the Commissioner is strictly in accordance with the opinion.

The Court: Do you wish to say anything further?

Mr. Condon: I have nothing to say further, your

Honor, except that the final words in the decision merely were to enter a judgment under Rule 50, and I assume that is the proper tax liability of this Corporation, and I assume that is according to the submission to be made. Any ordinary taxpayer or business man who computed this liability in accordance with your decision would have done so and in accordance with, the submission we have made.

Mr. Whitley: I will say on that score that Rule 50 is a rule promulgated by the Court for the purpose of making a computation where the Court finds something other than what was determined in a deficiency notice. It says: You are right in one thing, but you are wrong in another, and it is going to call for a different result. That is the purpose of a Rule 50 computation. You do not have that situation here. The Court has not found anything that the Commissioner did was in error, except as to the penalty, and we have omitted that in the computation.

The Court: I will take this motion under consideration and pass upon it after further view of the record.

Mr. Condon: You see, your Honor, the importance of it is that if they ultimately have to pay all this tax, as far as I can see, this is the only time they can raise that issue under any procedure, and I am a practitioner for many years.

The Court: What do you have to say with reference to the suggestion of respondent's counsel that the matter you are talking about is with the Petitioner Corporation?

Mr. Condon: That is developed before us, sir. The only issue we have here is how to compute the excess profits tax of this corporation under your decision, and I submit the way we have computed it is the fair reasonable way that any tax man who reads it would compute it.

The Court: What is counsel's idea?

Mr. Whitley: That statement, stops short. It does not point out what the Court has said that requires him to take that action. There is nothing in the Court's opinion, and he has failed to show it, that says that the Commissioner must compute the excess profits tax on some particular basis. Now, I can not read that from the opinion. I do not think it is in there, and I think it is incumbent upon the Petitioner to point that out right now, because the Court must be guided by what is said under a Rule 50 computation, if it is to consider such a thing.

Mr. Condon: There are ample statements quoted in the affidavit, Your Honor.

The Court: The Court will consider all the papers that have been filed, and the record passed upon.

Mr. Condon: Thank you very much.

(Whereupon, at 12:00 o'clock, noon, hearing in the above-entitled matter was concluded.)

Filed: T.C.U.S. July 12, 1949.

The Tax Court of the United States

Docket No. 16845

TWIN OAKS COMPANY,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Denying recognition to a partnership, formed by petitioner's shareholders, which rented petitioner's premises and operated its business, respondent added the partnership profits to petitioner's income for the years 1942, 1943 and 1944, and determined deficiencies in the taxes and penalties. In its Memorandum Findings of Fact and Opinion, entered March 23, 1949, this Court sustained the determination in respect of the deficiencies, and directed entry of decision under Rule 50. In a computation filed May 12, 1949, respondent arrived at deficiencies by the same method followed in his determination, and in so doing computed excess profits tax credits for 1943 and 1944 by reference to invested capital, which he did not change in amount because of this Court's decision.

In a computation filed May 16, 1949, petitioner computes the excess profits tax credit by reference to amounts of invested capital increased to reflect the amounts credited to the partner-stockholders on

the partnership books and reduced by the portion of partnership profits paid to the partner-stockholders as salaries. Although petitioner assigned no error in the alternative, attacking the computation of deficiencies made by respondent under the view that the partnership was not recognizable, petitioner now argues that under the Court's holding the amounts credited to partners and several minor items should be deemed accumulated earnings or loans which increased invested capital and hence the base for computing the excess profits tax credit.

We are not impressed by the argument that profits credited to the individuals who were petitioner's stockholders have the character of accumulated earnings of the corporation under a holding denying recognition to the partnership. But as no issue was raised in the pleadings as to the computation of taxes under respondent's determination that the partnership should not be recognized, none may be now raised and decided under Rule 50. Accordingly it is:

Ordered and Decided: That there are the following deficiencies in tax:

Year	Income Tax	Declared Value Excess Profits Tax	Excess Profits Tax
1942.....	\$1,394.61	\$ 373.11	\$.....
1943.....	3,120.38	3,778.43	11,311.08
1944.....	4,532.68	6,565.25	24,562.88

[Seal] /s/ LUTHER A. JOHNSON,
Judge.

Entered July 18, 1949.

Served July 18, 1949.

[Title of Tax Court and Cause.]

ORDER FIXING AMOUNT OF BOND

Upon application of counsel for the above-named petitioner to fix the amount of the bond on appeal to the United States Court of Appeals for the Ninth Circuit at \$13,791.88, with "No objection" endorsed thereon by counsel for the respondent, it is

Ordered that the said bond be and the same hereby is fixed in the amount of \$14,000.00.

/s/ LUTHER A. JOHNSON,
Judge.

Dated: Washington, D. C., August 30, 1949.

EMT/mbw

Served August 31, 1949.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES IN DOCKET NO. 16845

Now comes the above-named Petitioner and applies for review of the decision of The Tax Court of The United States in the above-entitled cause, by United States Court of Appeals for the Ninth Circuit, which said decision was entered on July 18, 1949, pursuant to the determination of said Court set forth in Memorandum Findings of Fact and Opinion (Honorable Luther A. Johnson, Judge),

entered on March 23, 1949, and by which the Court ordered and decided that there are deficiencies in income taxes, declared value excess profits taxes, and excess profits taxes, assessable against the above-named Petitioner as follows:

Year	Income Tax	Declared Value	Excess
		Excess Profits Tax	Profits Tax
1942.....	\$1,394.61	\$ 373.11	\$.....
1943.....	3,120.38	3,778.43	11,311.08
1944.....	4,532.68	6,565.25	24,562.88

The nature of the controversy is as follows: Petitioner above-named seeks reversal of the decision, entered as aforesaid, which sustained the determination of the Commissioner of Internal Revenue, Respondent above-named, as set forth in the 90-day letter of deficiency issued by said Respondent and dated October 3, 1947. Said deficiencies in taxes were computed by the disallowance of net operating loss deductions claimed by Petitioner above-named, in amount of \$904.83 for the year 1942 and in amount of \$248.55 for the year 1943, and by the inclusion in income of Petitioner above-named for each of the years hereinafter stated income realized by Twin Oaks Builders Supply Company, a partnership, in amounts and in years as follows:

Year	Ordinary Income	Long-Term
		Capital Gain
1942.....	\$ 4,703.66	\$621.63
1943.....	28,886.52	
1944.....	52,302.35	116.67

The income realized by Twin Oaks Builders Supply Company, a partnership, in amount and in each

year as hereinbefore set forth, was reported on separate individual income tax returns filed for each of said years by the members of said partnership. Petitioner prays for review and reversal of the decision of the Tax Court entered as aforesaid upon the grounds and for the reason that said decision is not supported by substantial or any evidence in the record and is not in accordance with law, particularly, in that said net operating loss deductions were properly claimed for the years 1942 and 1943, and said items of income realized by Twin Oaks Builders Supply Company, a partnership, and each of them, are properly taxable to the members of said partnership and not to Petitioner above-named.

Petitioner applies for review of said decision by United States Court of Appeals for the Ninth Circuit. Said Court has venue to review said decision for the reason that in said Circuit is located the office of the Collector of Internal Revenue (The Office of the Collector of Internal Revenue for the District of Oregon at Portland, Oregon) to which was made return of each and all of the items of income in respect to which the asserted tax deficiencies arise.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,
Counsel for Petitioner.

State of Oregon,
County of Multnomah—ss.

I, Ralph R. Bailey, being first duly sworn, depose and say:

That I am one of the attorneys of record for Twin Oaks Company, Petitioner on review in the within entitled cause, and that I reside and have my office in the City of Portland, County of Multnomah, State of Oregon; that on the 14th day of September, 1949, I duly served the foregoing Petition for Review of the decision of the Tax Court of the United States, by United States Court of Appeals for the Ninth Circuit, by mail, by attaching a true copy thereof, duly certified by me to be such, to the Notice of the Filing of said Petition for Review and by placing the original of said Notice of Filing of Petition for Review, with said copy of the Petition for Review attached thereto, in an envelope securely sealed and plainly addressed to Honorable Charles Eliphant, Esq., Chief Counsel, Bureau of Internal Revenue, Treasury Department, Washington, D. C., and depositing same, with the postage fully prepaid thereon, in one of the regular public mail receiving receptacles of the United States Post Office in said Portland, Oregon; that then and ever since, said Honorable Charles Oliphant was and is the attorney of record in said cause for the Commissioner of Internal Revenue, Respondent therein, and that he maintains his office at the address shown on said envelope as aforesaid, and same was and is his cor-

rect post office address, at which he regularly receives his mail in the usual course of business; that on and ever since the date of such service there was and is direct and regular communication by United States mail between the city named in said address and said Portland, Oregon.

/s/ RALPH R. BAILEY.

Subscribed and sworn to before me this 14th day of September, 1949.

[Seal] /s/ CLIFFORD N. NELSON,
Notary Public for Oregon.

My Commission Expires March 31, 1952.

Received and Filed, T. C. U. S., September 16, 1949.

[Title of Tax Court and Cause.]

NOTICE OF PETITION FOR REVIEW

To United States Court of Appeals
for The Ninth Circuit

To The Commissioner of Internal Revenue, the Respondent above-named, and Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Attorney of Record for Respondent.

Notice is hereby given of the filing by Twin Oaks Company, Petitioner above-named, of its petition for review by United States Court of Appeals For The Ninth Circuit of the decision of The Tax Court of The United States entered in the above-entitled cause on July 18, 1949. A copy of said petition is

attached hereto. Said petition is filed, and this notice given, pursuant to Sections 1141 and 1142, Internal Revenue Code (26 U. S. C. A. Sections 1141 and 1142), and Rule 30 of the United States Court of Appeals for the Ninth Circuit.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,

Counsel For Petitioner.

Service of a copy of the foregoing notice, together with a copy of the petition for review is hereby acknowledged this 19th day of September, 1949.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Filed T. C. U. S. September 21, 1949.

In the United States Court of Appeals
For The Ninth Circuit

No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS

Now comes the Petitioner on review in the above-entitled proceedings and hereby designates the following points on which it intends to rely on review

by United States Court of Appeals For The Ninth Circuit of a decision of The Tax Court:

1. The Tax Court erred in ordering and deciding that there are deficiencies in income taxes, declared value excess profits taxes, and excess profits taxes, on returns filed by Petitioner on review for the years 1942, 1943 and 1944 as follows:

Year	Income Tax	Declared Value	Excess
		Excess Profits Tax	Profits Tax
1942.....	\$1,394.61	\$ 373.11	\$.....
1943.....	3,120.38	3,778.43	11,311.08
1944.....	4,532.68	6,565.25	24,562.88

2. The Tax Court erred in holding and deciding that income realized by Twin Oaks Builders Supply Company, a partnership, in the years 1942, 1943 and 1944, is taxable to the Petitioner on review, and in holding and deciding that the income realized by the partnership as aforesaid is subject to the taxes imposed on income realized by corporations in and for said years as follows: normal tax imposed by Section 13, Internal Revenue Code (26 U. S. C. A., Section 13); surtax imposed by Section 15, Internal Revenue Code (26 U. S. C. A., Section 15); declared value excess profits tax imposed by Section 600, Internal Revenue Code (26 U. S. C. A., Section 600); and excess profits tax imposed by Section 710, Internal Revenue Code (26 U. S. C. A., Section 710).

3. The Tax Court erred in holding and deciding that Twin Oaks Builders Supply Company, a partnership, was not during the years 1942, 1943 or 1944

a bona fide partnership recognizable for Federal income tax purposes, and in holding and deciding that the only real purpose which motivated the formation of the partnership was to achieve a re-allocation of income among family groups so as to reduce income tax liability.

4. The Tax Court erred in holding and deciding that the transfer of the business, and assets thereof, by Petitioner on review to Twin Oaks Builders Supply Company, a partnership, on January 2, 1941 was without substance, and in holding and deciding that the ownership of said business and assets by the partnership in 1942, 1943 and 1944 could not be recognized for Federal income tax purposes.

5. The Tax Court erred in holding and deciding that the leasing of the real property by Petitioner on review to Twin Oaks Builders Supply Company, a partnership, on January 2, 1941, was without substance, and in holding and deciding that the rights of the partnership in said real property under the lease could not be recognized for Federal income tax purposes.

6. The Tax Court erred in holding and deciding that John J. Rogers and Louis C. Scharpf conducted the business, after January 1941, with the same assets and in the same manner as said business was conducted prior to January, 1941.

7. The Tax Court erred in holding and deciding that no additional funds were paid into the business

as operating capital thereof at the time that said business was transferred by Petitioner on review to Twin Oaks Builders Supply Company, a partnership.

8. The Tax Court erred in holding and deciding that no assets were removed from the ownership of Petitioner on review by the transfer of said assets to Twin Oaks Builders Supply Company, a partnership, and in holding and deciding that there was no change in policy in management of the business, or in the managing personnel of the business, resulting from the transfer of the business by Petitioner on review to Twin Oaks Builders Supply Company, a partnership.

9. The Tax Court erred in holding and deciding that the contributions of the partners to the capital of Twin Oaks Builders Supply Company, a partnership, were made, and the sale price of the assets transferred by Petitioner on review to said partnership was paid, in conformity with a scheme which had no substantive effect whatever on the business.

10. The Tax Court erred in holding and deciding that Twin Oaks Builders Supply Company, a partnership, contributed absolutely nothing either in services or capital to the production of the income realized by said partnership in 1942, 1943 and 1944, and in holding and deciding that the only function and purpose of the partnership in said years was to siphon off the greater portion of the earnings of the business.

11. The Tax Court erred in holding and deciding that the business of Petitioner on review, prior to January 2, 1941, was unitary in character and not susceptible of any logical division.

12. The Tax Court erred in holding and deciding that the oral testimony of John J. Rogers and Louis C. Scharpf, with respect to their reasons for transferring the business from Petitioner on review to Twin Oaks Builders Supply Company, a partnership, affirmatively supports the view that the purpose of the partnership was to achieve a reallocation of income among family groups.

13. The Tax Court erred in making a determination as to the status for Federal income tax purposes of Twin Oaks Builders Supply Company, a partnership, when the status of said partnership, for the purposes of Federal income tax, was not an issue in the case, and, particularly, The Tax Court erred in holding and deciding that income realized by said partnership is taxable to Petitioner on review, because of the determination of the Court that said partnership is not recognizable for tax purposes, when the status of said partnership for Federal income tax purposes was not an issue in the case and the evidence with respect to said matter was not presented at trial.

14. The Tax Court erred in entering as the decision of the Court the computations of excess profits taxes for the years 1942, 1943 and 1944 submitted to the Court by the Respondent, Commis-

sioner of Internal Revenue, under Rule 50 of The Tax Court, and in refusing to enter as the decision of the Court the computations of excess profits taxes for the years 1942, 1943 and 1944 submitted to the Court by Petitioner on review under Rule 50 of The Tax Court.

15. The Tax Court erred in holding and deciding that the Petitioner on review may not, upon the determination by the Court of the tax deficiencies under Rule 50 of said Court, raise an issue as to the tax computations submitted by the Respondent, Commissioner of Internal Revenue, pursuant to said Rule 50, because such issue was not raised by the pleadings filed by the Petitioner on review.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,

Counsel for Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed T. C. U. S., September 16, 1949.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents 1 to 41, inclusive, constitute and are all of the original papers and proceedings on file in my office as the original and complete record in

the proceeding before The Tax Court of the United States entitled: "Twin Oaks Company, Petitioner, v. Commissioner of Internal Revenue, Respondent," Docket Number 16845, and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 4th day of October, 1949.

[Seal]

VICTOR S. MERSCH,

Clerk.

[Endorsed]: No. 12386. United States Court of Appeals for the Ninth Circuit. Twin Oaks Company, Petitioner, vs. Commissioner of Internal Revenue. Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed October 24, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For The Ninth Circuit

No. 12386

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS TO BE RELIED
ON BY PETITIONER ON REVIEW

Now comes the Petitioner on review in the above-entitled proceedings and hereby designates the following points on which it intends to rely on review by United States Court of Appeals For The Ninth Circuit of a decision of The Tax Court:

1. The Tax Court erred in ordering and deciding that there are deficiencies in income taxes, declared value excess profits taxes, and excess profits taxes, on returns filed by Petitioner on review for the years 1942, 1943 and 1944 as follows:

Year	Income Tax	Declared Value	Excess
		Excess Profits Tax	Profits Tax
1942.....	\$1,394.61	\$ 373.11	\$.....
1943.....	3,120.38	3,778.43	11,311.08
1944.....	4,532.68	6,565.25	24,562.88

2. The Tax Court erred in holding and deciding that income realized by Twin Oaks Builders Supply Company, a partnership, in the years 1942, 1943

and 1944, is taxable to the Petitioner on review, and in holding and deciding that the income realized by the partnership as aforesaid is subject to the taxes imposed on income realized by corporations in and for said years as follows: normal tax imposed by Section 13, Internal Revenue Code (26 U. S. C. A., Section 13); surtax imposed by Section 15, Internal Revenue Code (26 U. S. C. A., Section 15); declared value excess profits tax imposed by Section 600, Internal Revenue Code (26 U. S. C. A., Section 600); and excess profits tax imposed by Section 710, Internal Revenue Code (26 U. S. C. A., Section 710).

3. The Tax Court erred in holding and deciding that Twin Oaks Builders Supply Company, a partnership, was not during the years 1942, 1943 or 1944 a bona fide partnership recognizable for Federal income tax purposes, and in holding and deciding that the only real purpose which motivated the formation of the partnership was to achieve a reallocation of income among family groups so as to reduce income tax liability.

4. The Tax Court erred in holding and deciding that the transfer of the business, and assets thereof, by Petitioner on review to Twin Oaks Builders Supply Company, a partnership, on January 2, 1941 was without substance, and in holding and deciding that the ownership of said business and assets by the partnership in 1942, 1943 and 1944 could not be recognized for Federal income tax purposes.

5. The Tax Court erred in holding and deciding that the leasing of the real property by Petitioner on review to Twin Oaks Builders Supply Company, a partnership, on January 2, 1941, was without substance, and in holding and deciding that the rights of the partnership in said real property under the lease could not be recognized for Federal income tax purposes.

6. The Tax Court erred in holding and deciding that John J. Rogers and Louis C. Scharpf conducted the business, after January, 1941, with the same assets and in the same manner as said business was conducted prior to January, 1941.

7. The Tax Court erred in holding and deciding that no additional funds were paid into the business as operating capital thereof at the time that said business was transferred by Petitioner on review to Twin Oaks Builders Supply Company, a partnership.

8. The Tax Court erred in holding and deciding that no assets were removed from the ownership of Petitioner on review by the transfer of said assets to Twin Oaks Building Supply Company, a partnership, and in holding and deciding that there was no change in policy in management of the business, or in the managing personnel of the business, resulting from the transfer of the business by Petitioner on review to Twin Oaks Builders Supply Company, a partnership.

9. The Tax Court erred in holding and deciding that the contributions of the partners to the capital of Twin Oaks Builders Supply Company, a partnership, were made, and the sale price of the assets transferred by Petitioner on review to said partnership was paid, in conformity with a scheme which had no substantive effect whatever on the business.

10. The Tax Court erred in holding and deciding that Twin Oaks Builders Supply Company, a partnership, contributed absolutely nothing either in services or capital to the production of the income realized by said partnership in 1942, 1943 and 1944, and in holding and deciding that the only function and purpose of the partnership in said years was to siphon off the greater portion of the earnings of the business.

11. The Tax Court erred in holding and deciding that the business of Petitioner on review, prior to January 2, 1941, was unitary in character and not susceptible of any logical division.

12. The Tax Court erred in holding and deciding that the oral testimony of John J. Rogers and Louis C. Scharpf, with respect to their reasons for transferring the business from Petitioner on review to Twin Oaks Builders Supply Company, a partnership, affirmatively supports the view that the purpose of the partnership was to achieve a reallocation of income among family groups.

13. The Tax Court erred in making a determination as to the status for Federal income tax purposes of Twin Oaks Builders Supply Company, a partnership, when the status of said partnership, for the purposes of Federal income tax, was not an issue in the case, and, particularly, The Tax Court erred in holding and deciding that income realized by said partnership is taxable to Petitioner on review, because of the determination of the Court that said partnership is not recognizable for tax purposes, when the status of said partnership for Federal income tax purposes was not an issue in the case and the evidence with respect to said matter was not presented at trial.

14. The Tax Court erred in entering as the decision of the Court the computations of excess profits taxes for the years 1942, 1943 and 1944 submitted to the Court by the Respondent, Commissioner of Internal Revenue, under Rule 50 of The Tax Court, and in refusing to enter as the decision of the Court the computations of excess profits taxes for the years 1942, 1943 and 1944 submitted to the Court by Petitioner on review under Rule 50 of The Tax Court.

15. The Tax Court erred in holding and deciding that the Petitioner on review may not, upon the determination by the Court of the tax deficiencies under Rule 50 of said Court, raise an issue as to the tax computations submitted by the Respondent, Commissioner of Internal Revenue, pursuant to said

Rule 50, because such issue was not raised by the pleadings filed by the Petitioner on review.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,

Attorneys for Petitioner
on Review.

Affidavit of service by mail attached.

[Endorsed]: Filed C. C. A. October 26, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED

To the Clerk of the United States Court of Appeals for the Ninth Circuit:

In connection with the Petition for Review of the decision of The Tax Court of the United States entered herein on July 18, 1949, by the United States Court of Appeals for the Ninth Circuit, it is respectfully designated that there be printed under your supervision the entire record in the above-entitled cause as certified and transmitted by the Clerk of the Tax Court of the United States, except as following entries as appearing on the Docket of the Tax Court of the United States:

Motion for and Order Granting Extension of Time to File Petitioner's Brief, Docket No. 15.

Petitioner's Opening Brief, Docket No. 16.

Motion for and Order Granting Enlargement of Time to File Brief for Respondent, Docket No. 17.

Respondent's Motion for and Order Granting Extension to File Brief, Docket No. 18.

Respondent's Motion for and Order Granting Leave to File Brief, Docket No. 19.

Reply Brief for Respondent, Docket No. 20.

Motion for Order and Order Extending Time to File Petitioner's Reply Brief, Docket No. 21.

Petitioner's Reply Brief, Docket No. 22.

Petitioner on Review has made application to this Court to be relieved from printing or reproducing Petitioner's original Exhibits 1 through 44, appearing as Docket Entry No. 9 on the Docket of the Tax Court of the United States, and Respondent's original Exhibits A, B, C, E, F, G, K through Z, AA through GG, appearing as Docket Entry No. 10 on the Docket of the Tax Court of the United States. In the event that said application is granted by the Court, then it is respectfully requested that said original Exhibits not be included in the record to be printed as herein designated.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,

Attorneys for Petitioner on
Review.

Affidavit of service by mail attached.

[Endorsed]: Filed C.C.A. October 26, 1949.

In the United States Court of Appeals
for the Ninth Circuit

No. 12386

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPLICATION FOR RELIEF FROM PRINT-
ING OR REPRODUCING EXHIBITS

Comes now the Petitioner on Review in the above-entitled proceedings by its Counsel of Record, and

Averring that the original Exhibits admitted in evidence at trial in said proceeding before the Tax Court of the United States, consist of Petitioner's Exhibits 1 to 44, inclusive, and Respondent's Exhibits A, B, C, E, G, and K to Z inclusive, and AA to GG inclusive; that said Exhibits consist mainly of financial statements, schedules of arithmetical computations, income tax returns and legal documents; and that most of said Exhibits are of such a nature as to make the same not of printable type or of such a nature as to make the cost of printing the same substantial;

Makes application to the Court for an Order directing that, on the basis of the facts hereinbefore averred and the affidavit attached hereto and made part hereof, the original Exhibits admitted in evi-

dence at trial of said proceedings before the Tax Court of the United States, and certified and transmitted by the Clerk of the Tax Court of the United States to the Clerk of this Court, need not be printed in the record on review herein, and directing that said Exhibits shall be considered by this Court, and may be referred to by Counsel in their respective briefs and on oral argument and reproduced in whole or part in an appendix to their respective briefs, with the same force and effect as if said Exhibits were included in the printed record on review.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,

Attorneys for Petitioner on
Review.

So Ordered:

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

/s/ WALTER L. POPE,

U. S. Circuit Judges.

State of Oregon,

County of Multnomah—ss.

I, Ralph R. Bailey, being first duly sworn, depose and say that I am one of the Attorneys of Record for Petitioner on Review in the within cause; that the original Exhibits admitted in evidence in said cause before the Tax Court of the United States consist of Petitioner's Exhibits 1 to 44, inclusive, and Respondent's Exhibits A, B, C, E, F, G, and K to Z

inclusive, and AA to GG, inclusive; that said Exhibits consist mainly of financial statements, schedules of arithmetical computations, income tax returns and legal documents; that most of said Exhibits are of such a nature as to make the same not of a printable type or of such a nature as to make the cost of printing the same substantial.

/s/ RALPH R. BAILEY.

Subscribed and sworn to before me this 24th day of October, 1949.

[Seal] /s/ MARION HUGGINS,
Notary Public for Oregon.

My Commission Expires March 13, 1951.

Affidavit of service by mail attached.

[Endorsed]: Filed October 26, 1949.

No. 12,386

IN THE
United States
Court of Appeals
For the Ninth Circuit

TWIN OAKS COMPANY,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Brief for Petitioner

On Petition to Review a Decision of the Tax Court
of the United States

HERMAN PHLEGER,
THEODORE R. MEYER,
ALVIN J. ROCKWELL,
CARL E. DAVIDSON,
RALPH R. BAILEY,

Attorneys for Petitioner.

BROBECK, PHLEGER & HARRISON,
Of Counsel.

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No. 12,386

IN THE

United States Court of Appeals

For the Ninth Circuit

TWIN OAKS COMPANY,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Brief for Petitioner

On Petition to Review a Decision of the Tax Court
of the United States

JURISDICTION

This case brings on for review a decision of the Tax Court of the United States holding petitioner liable for deficiencies in the taxable years ending December 31, 1942, 1943 and 1944, as follows (R. 326):

Year	Income Tax	Declared Value Excess Profits Tax	Excess Profits Tax
1942	\$1,394.61	\$ 373.11	\$ —
1943	3,120.38	3,778.43	11,311.08
1944	4,532.68	6,565.25	24,562.88

The Commissioner's notice of deficiency was mailed to petitioner on October 3, 1947 (R. 10), and the petition for redetermination was filed with the Tax Court on December 24, 1947 (R. 2). The Tax Court, therefore, had jurisdiction under Section 272(a)(1), Internal Revenue Code, 53 Stat. 82, as amended, 26 U.S.C. Section 272(a)(1).

The Tax Court entered its decision on July 18, 1949 (R. 4, 325). Petition for review of the decision by this Court was filed by petitioner on September 16, 1949 (R. 4, 327-331). Petitioner's tax returns for the years in question were filed with the Collector of Internal Revenue for the District of Oregon (R. 268; R. 257-258, Res. Exhs. L, M, N). Accordingly, this Court has jurisdiction under Sections 1141 and 1142, Internal Revenue Code, 53 Stat. 164, 165, as amended, 26 U.S.C. Sections 1141, 1142, *Ibid.*, Supp. II.

SUBSTANCE OF THE CONTROVERSY

The Commissioner of Internal Revenue has taxed Twin Oaks Company, a corporation (the petitioner here), on income earned by a partnership, which succeeded to the corporation's business. The years 1942, 1943 and 1944 are involved in the case; but in practice the present decision will presumably control the later years also.

The fundamental question is whether this income should be taxed to the partnership, which earned it, or whether the Commissioner was right when he taxed it to the petitioner corporation.

Twin Oaks Company, the petitioner, is an Oregon corporation, with its office at Eugene. It was incorporated in 1924 and until 1941 conducted a lumber and building supply business. It was not a large company, its total

assets never exceeding \$151,000. The business was hardly profitable. During the six years from 1935-1940, it sustained operating losses in four and a net deficit in one, 1938. Its highest net income was \$6,036.35 in 1940.

The company had 946 shares of \$100 par value, a total of \$94,600. Half were owned by John J. Rogers, who was the president, the other half by Louis C. Scharpf, the secretary-treasurer, and his wife, in the respective amounts of 35.3 and 437.7 shares. Rogers and Scharpf received salaries which at their highest were \$7,200 each per annum, and ran the business.

In 1939 Scharpf suggested that the business be conducted as a partnership. Rogers demurred: he did not like the personal liability of a partner. But Scharpf persisted, and during 1940 they had a number of conferences with E. R. Bryson, the company's long-time attorney. The attorney finally recommended Scharpf's plan, and Rogers agreed on condition that the company continue to hold the real estate.

Accordingly, in January 1941, Rogers, Scharpf, and their wives entered into a partnership agreement, whereby all four were to conduct the business as equal partners with operating assets which they were to acquire from the Twin Oaks Company. Each made a capital contribution of \$2,000 and they agreed to share profits and losses equally. Rogers and Scharpf, as partners, were to continue to head the business.

On January 2, 1941, the corporation accepted the offer of Rogers, Scharpf and their wives to acquire its current assets in consideration of their assumption of certain of its accounts and notes payable, and their note for the

balance; and agreed to lease them the premises and to discontinue its lumber and building supply business. The transfer was concluded in accordance with the offer and acceptance. Fair value was paid for the assets and a reasonable rental was provided in the lease.

Books for the partnership were opened and its own bank account established. The partners signed and filed a certificate showing that they were doing business under the assumed name of Twin Oaks Builders Supply Company, and published notice of this. The partnership filed a certificate with the State Industrial Accident Commission that it was engaging in a hazardous business, employing 25 people, with a monthly payroll of about \$2,600. It registered with the State Unemployment Compensation Commission. The partnership did not draw financial or other support from the company or lean upon it in any way.

The partnership earned profits as follows:

1941.....	\$29,776
1942.....	18,525
1943.....	42,086
1944.....	66,119

Partnership returns were duly filed and the partners returned their respective shares of the profits as income and paid their individual taxes. A note of \$89,378.35 given by the partnership to the corporation as part of the consideration for the transfer of the business, together with interest, was paid in full in 1946.

The Commissioner, on October 3, 1947, mailed to the corporation a notice of deficiency asserting additional taxes against it as follows:

1942.....	\$ 1,767
1943.....	18,209
1944.....	35,660
<hr/>	
Total.....	\$55,636

As a parting shot, the Commissioner claimed penalties of \$8,967 for failure of the corporation to file excess profits tax returns. (The single Tax Court judge, who handled the case, refused to sustain the Commissioner as to the penalties, and they are no longer involved.)

All these taxes and penalties were asserted against the corporation on the claim that the partnership and the transfer from the corporation to it were without substance and should be disregarded. On this theory, the Commissioner treated the partnership income as that of the corporation and asserted taxes upon it accordingly.

The question, then, is a simple one: Can the Commissioner in the present circumstances treat as income of a corporation income which is earned by another entity, as it happens here, a partnership?

We assert that the evidence shows conclusively that a partnership was formed in good faith and in fact; that this partnership succeeded to the business and assets of the corporation; and that the income involved was earned by it, and can no more be treated as income of the corporation than can income of A be assessed to B.

We maintain that the power here asserted by the Commissioner if applied generally would mean that no corporation could be dissolved, and its business thereafter conducted by its stockholders, and no partnership could be incorporated into a corporation, without danger that the

Commissioner might arbitrarily levy taxes by ignoring the change in the legal status of the taxpayer.

We direct the Court's attention to three circumstances which are important to an understanding of the facts: 1. The transfer of the business from the corporation to the partnership was not made for any tax purpose; the prior earnings of the company were very slight; the excess profits tax was not even enacted until many months after Scharpf urged the change. 2. Since a *bona fide* transfer was made, and the partnership conducted the business and earned the income, a tax saving purpose, in any event, would have been immaterial. 3. This case does not involve any "family partnership" question—that is to say, the issue here is not one of taxing the wives' income to the husbands' but of taxing the income of all four partners *to the corporation*.

We now proceed to a full statement of the matter.

STATEMENT OF THE CASE

Questions Presented.

1. Whether, as held by the Tax Court, the Commissioner of Internal Revenue could lawfully impose upon petitioner, a corporation, income taxes, declared value excess profits taxes and excess profits taxes, with respect to the income of a separate legal entity, a partnership, derived from a business conducted by such partnership.

2. Only in the event that the foregoing question is answered in the affirmative will it be necessary to consider the further question:

Whether, after holding that the income of a partnership was to be attributed and taxed to petitioner, a corporation, the Tax Court, in computing the resulting de-

ficiency in excess profits taxes, could lawfully refuse to include, as part of the petitioner's invested capital, the invested capital and accumulated earnings and profits of the partnership.

Statutes Involved.

The classes of taxes here involved were imposed for the years 1942, 1943 and 1944 by: (1) Corporation normal income tax—Internal Revenue Code, Section 13, 53 Stat. 7, as amended through the Revenue Act of October 21, 1942; 26 U.S.C., 1940 ed., Sec. 13; *Ibid.*, Supp. II. (2) Surtax—Internal Revenue Code, Section 15, as amended by the Revenue Act of October 21, 1942, Title I, Section 105(b), 56 Stat. 805; 26 U.S.C., 1940 ed. Supp. II, Section 15. (3) Declared value excess profits tax—Internal Revenue Code, Section 600, 53 Stat. 111, as amended through the Revenue Act of October 21, 1942; 26 U.S.C., 1940 ed., Supp. II, Section 600. (4) Excess profits tax—Internal Revenue Code, Section 710, as amended by the Revenue Act of October 8, 1940, Title II, Section 201, 54 Stat. 975, and as thereafter amended through the Act of February 25, 1944; 26 U.S.C., 1940 ed., Section 710; *Ibid.*, Supp. II; *Ibid.*, Supp. IV.

The scheme of these sections, as shown in Section 13(b) of the Internal Revenue Code, *supra*, with respect to the corporation normal-tax net income, is to tax the "income of every corporation." The critical question in the present case is whether the income of a separate legal entity, here a partnership, can lawfully be treated as the "income of" petitioner corporation. The Tax Court's opinion (R. 277-284) does not cite any of the above sections.

The provisions governing the allowance of the excess profits credit for the years in question (Item 2 under

Questions Presented) are derived from the Revenue Act of October 8, 1940, *supra*, imposing the excess profits tax, 26 U.S.C., 1940 ed., Secs. 711(a)(2), 712(a), 714-720; *Ibid.*, Supp. II; *Ibid.*, Supp. IV. On this issue, Rule 50, Rules of Practice before the Tax Court of the United States, is also involved, and is quoted in the Argument, *infra*, pp. 58-59.

The Material Facts.

The material facts, all of which are based on uncontradicted evidence, may be summarized as follows:

Petitioner's business prior to 1941. Petitioner, an Oregon corporation with its principal office at Eugene, Oregon, was engaged in the sale of lumber and building supplies, until 1941 at Eugene and Junction City, Oregon, and until 1937 at Cottage Grove, Oregon (R. 268; R. 5, 20, 46, 145-146).¹ In 1941 petitioner had outstanding 946 shares of stock at a par value of \$94,600, or \$100 a share. Half, or 473, of these shares were owned by John J. Rogers, petitioner's president, and 35.3 shares were owned by Louis C. Scharpf, petitioner's secretary-treasurer. The remaining 437.7 shares were owned by Scharpf's wife, Eva M. Scharpf, having been purchased by her, for the most part prior to 1930, with inherited funds (R. 268; R. 36, 40, 75-76, 80, 156-157, Pet. Exh. 18).

During the years 1935-40 petitioner's books showed assets which were carried at totals ranging from \$117,283.26 in 1938 to \$150,531.66 in 1940. These assets con-

¹Where the references are separated by a semicolon, the reference preceding the semicolon is to the Tax Court's finding of fact and the subsequent references are to the supporting evidence.

By order of this Court (R. 347) the exhibits are not printed but may be referred to by counsel and considered by the Court.

sisted chiefly of merchandise inventory and accounts receivable; in addition there were land, buildings, furniture and fixtures, which had a book value of about \$37,000 (R. 268-269; R. 29-30, 46, Pet. Exh. 1). The land and buildings consisted of town lots at Eugene, improved with a concrete building and hydraulic elevator, a large frame building, a storage shed and a spur railway track; two lots at Junction City, improved with a hollow tile warehouse and a wooden shed; and at Cottage Grove, an old warehouse and vacant lots. Prior to 1941, petitioner also occupied leased premises. The Cottage Grove property was sometimes rented, but produced little income (R. 270, 271; R. 44-45, 145-146).

During 1935-40 petitioner usually sustained small operating losses, but receipts from other sources produced net income of a little over \$2,000 for 1936, 1937 and 1939, \$677.05 for 1935, and \$6,036.35 for 1940 (R. 269; R. 30, Pet. Exh. 3). For 1938 petitioner had a loss of \$511.65 (Pet. Exh. 3).

At the close of 1940 petitioner's balance sheet showed the following assets and liabilities (R. 270; R. 29-30, Pet. Exh. 1):

ASSETS		
Cash	\$	243.96
Notes and Accounts Receivable.....		37,477.76
Merchandise		70,892.48
Investments		2,926.09
Land		23,993.25
Buildings	\$26,276.49	
Furniture	6,959.28	
Trucks	5,239.49	
	<hr/>	
	\$38,475.26	
Less: Depreciation.....	23,653.78	
	<hr/>	
	\$14,821.48	14,821.48
Prepaid Insurance.....		176.64
		<hr/>
Total		\$150,531.66

LIABILITIES

Accounts Payable.....	\$ 16,271.55
Notes Payable.....	34,238.00
Accrued Taxes.....	3,001.89
Earned Surplus.....	2,420.22
Capital Stock.....	94,600.00
Total	<u>\$150,531.66</u>

The accounts or notes payable included \$2,144 due Rogers, of which \$1,200 was for salary and \$944 for dividends; \$1,270.60 due Scharpf, of which \$1,200 was salary and \$70.60 dividends; \$873.40 due Eva M. Scharpf, for a dividend; and \$1,500 due Rogers' wife, Corabelle M. Rogers, on a note (R. 270; R. 68-70). The debt last mentioned was in consideration of \$1,500 actually advanced by Corabelle M. Rogers to the corporation and the other liabilities listed were likewise *bona fide* obligations of petitioner (R. 131-132, 156).

Rogers and Scharpf had become stockholders of petitioner in the late twenties, when they became acquainted and decided to conduct the lumber and supply business in corporate form (R. 39, 80, 92-93, 139). Both were actively engaged in the business throughout the intervening years to 1941. Rogers purchased stocks of lumber, shingles, moulding and coal and had charge of credit and collections. Scharpf made purchases of all the other building materials handled and he was in charge of all sales. They received equal salaries from petitioner which, combined, ranged from \$9,800 in 1937 to \$14,400 in 1940 (R. 269; R. 30, 80-81, 116, Pet. Exh. 3).

Petitioner's withdrawal from the lumber and building supply business in January 1941. In the latter part of 1939 Scharpf suggested to Rogers that the business be

conducted as a partnership (R. 269; 40-41, 97, 116, 140).²

Scharpf believed that the 35.3 shares which he owned in petitioner, out of the 946 shares outstanding, did not adequately reflect his value to the enterprise (R. 41, 75, 93-95, 116, 137). He was also of the opinion that the business could be more readily liquidated, when he might so elect, if conducted in partnership rather than in corporate form (R. 61, 137). Neither Rogers nor Scharpf at any time gave weight to the advantages and disadvantages from a tax standpoint of doing business in the corporate as distinct from the partnership form (R. 85, 86, 97, 115, 140-141, 142, 150-151).³

Rogers was not agreeable to the change proposed by Scharpf, being reluctant to assume the unlimited liability of a partner (R. 41, 97, 140). Scharpf persisted, however, and during 1940 both had a number of conferences with

²Approximately \$36,000 of the total deficiency of about \$56,000 which the Commissioner seeks to impose upon petitioner for the years in question (*supra*, page 1) consists of claimed excess profits tax liability which Rogers and Scharpf allegedly sought to avoid by doing business in partnership rather than in corporate form. It is to be noted from the above finding and supporting evidence that Scharpf first suggested the formation of a partnership in "the latter part of 1939." It is also to be noted that the wartime excess profits tax was first adopted in the Revenue Act of October 8, 1940 (*supra*, pp. 7, 8). This is mentioned in the Argument (*infra*, p. 32).

³The statements made in this paragraph, all based on uncontradicted testimony, are not included under the Tax Court's "Findings of Fact," nothing being said therein as to the purpose of the parties in transferring the business from petitioner to the partnership. We agree with the implication to be drawn from this omission, in that we believe and contend that the motive of Rogers and Scharpf and the others concerned is wholly immaterial to this case. (See Argument. *infra*, pp. 31-33.) The statements contained in the above paragraph are included, as pertinent to our later argument, solely because of certain comments made in the Tax Court's "Opinion" (*infra*, p. 20).

E. R. Bryson, an attorney who had given them advice for many years (R. 269; R. 93, 101-102). Scharpf saw no point in continuing petitioner and favored a complete liquidation of it prior to January 1, 1941 (R. 141). Rogers finally consented to the partnership on condition that petitioner remain in existence and continue to hold the real estate (R. 41, 97, 98, 141). Pursuant to a compromise arrangement, Rogers, Scharpf and their wives (Mrs. Rogers being included at Rogers' suggestion) decided to enter into a partnership agreement as of January 1, 1941, whereby the four were to conduct the business as equal partners with operating assets which petitioner was to transfer to them and on premises which petitioner was to retain and rent to them. Rogers and Scharpf were to continue to perform the character of work previously performed by them, and each was to be entitled to a "salary" (of \$6,600 a year) in addition to his respective share of the profits (R. 269, 271; R. 35, 41-42, 141, 155, 157, Pet. Exh. 15).⁴

At stockholders' and directors' meetings of petitioner held on January 2, 1941, it was voted to accept the offer of the partnership and to transfer the lumber and builders supply business to it (R. 32, Pet. Exhs. 8, 9). Pursuant to the offer and acceptance, petitioner thereupon, as of January 1, 1941, transferred to the partnership its current assets at book value in consideration of the assumption by the partnership of certain of petitioner's accounts

⁴The Tax Court's findings of fact include a long paragraph reciting various provisions of the partnership agreement (R. 272-273) and contain one or two other items concerning the internal organization of the partnership. These statements are not included herein because they appear to be immaterial to any issue before the Court. (See Argument, *infra*, pp. 33-36.)

and notes payable and the partnership's note with 2% interest for the balance. The assets so transferred consisted of petitioner's cash (\$243.96), notes and accounts receivable (\$37,477.76), inventory of merchandise (\$70,892.48), investments (\$2,726.09) and delivery equipment (\$1,809.61), of an aggregate value of \$113,149.90. In return, petitioner was enabled to eliminate from its accounts and notes payable \$16,271.55 and \$7,500, respectively, in a total amount of \$23,771.55. The difference between these amounts (\$113,149.90 less \$23,771.55) was represented by the partnership's note for \$89,378.35, with 2% interest, payable in one year, dated January 2, 1941. The foregoing transactions were correctly reflected in petitioner's books as of January 1, 1941 (R. 273-274; R. 29-30, 33, 42-43, 43-44, 47, Pet. Exhs. 1, 11).

As of the same date partnership books were opened, correctly reflecting its side of the transaction (R. 37, 81, Pet. Exh. 22). These books showed as assets of the partnership the cash, notes and accounts receivable, merchandise, investments and delivery equipment in the same amounts as previously carried on petitioner's books and also an account receivable of \$500 from Mrs. Rogers (satisfied in cash). Partnership liabilities were shown as accounts payable of \$16,271.55, notes payable of \$89,378.35, and partners' investment accounts of \$8,000 (R. 274; R. 31, 66-67, 72, 154-155, Pet. Exhs. 4, 22). The amount of the partners' contribution, of \$8,000 or \$2,000 each, was decided upon in the light of the fact that this amount had represented the average borrowings of petitioner when it conducted the business (R. 42, 152). The amount was provided largely by the cancellation of amounts owed to the partners or related

interests by petitioner, the consequent adjustment to the benefit of the partnership being reflected in the above figures (R. 32, 67-72, 118-120, 131-133, 152-155, Pet. Exh. 7). Subsequent experience proved the partners correct in their judgment of the amount of capital required (R. 31, Pet. Exhs. 4, 6).

Also, in accordance with the offer and acceptance, petitioner changed its then existing name of Twin Oaks Builders Supply Company to its present name of Twin Oaks Company, filing amended Articles of Incorporation reflecting the change in name with the Oregon Corporation Commissioner in January 1941 (R. 83). Thereupon the partnership assumed the name Twin Oaks Builders Supply Company (R. 63). And, in accordance with the offer and acceptance, petitioner leased to the partnership its remaining fixed assets, consisting of real property, fixtures and equipment, for \$3,000 a year. The lease contained a provision requiring an adjustment of rent in the event of substantial additions to or diminution of the leased property (R. 36, 44-45, Pet. Exh. 17).⁵

⁵According to the uncontradicted testimony, assets of the character here involved are customarily sold in the building trade on the basis of book value or market value, whichever is lower, and this is a reasonable method of valuation (R. 43, 56). Likewise, according to the uncontradicted testimony, a loan of the character made by petitioner to the partnership would not customarily draw as high an interest rate as that charged by banks, there being no standard rate for such a loan (R. 186-187). There was also testimony that a yearly rental of \$3,000 constituted the fair rental value of the properties included within the lease (R. 45, 54-61, 61-63, 144, 162-172, 172-176, 201, 249-252), although on this point alone the Commissioner presented witnesses who sought to fix a different, higher value (R. 202-234, 235-248). The Commissioner's witnesses were not familiar with business conditions in the building industry in January 1941 or otherwise, and had only a passing familiarity with the properties involved.

The Tax Court made no reference to these matters, either in

A partnership agreement was signed on January 25, 1941, as of January 1, 1941 (R. 271; R. 35, Pet. Exh. 15).

The operation of the business beginning January 1941. By notice dated January 16, 1941, the partnership notified the State Industrial Accident Commission, Oregon, that it was engaged in the business formerly operated by petitioner and that the business constituted a hazardous occupation within the meaning of the State Workmen's Compensation Act (R. 47-48, Pet. Exh. 23). On or prior to January 25, 1941, the partnership filed with the State Unemployment Compensation Commission a registration as owner of the business, previously registered in the name of petitioner, pursuant to the provisions of the State Unemployment Compensation Act (R. 48-49, Pet. Exh. 24). The partnership filed its own contribution reports with this Commission beginning with the year 1941 (R. 50-51). The partnership applied for and received from the Collector of Internal Revenue at Portland, Oregon, an identification number, pursuant to the Federal Social Security Act (R. 49-50, Pet. Exh. 25). The partnership advised the First National Bank of Eugene, on January 2, 1941, of the transfer of the business and opened its own account with the Bank (R. 274-275; R. 45, 181-182, 189, Pet. Exh. 36).

The stationery used by the partnership carried a different letterhead from that used by the petitioner prior or subsequent to January 1, 1941, the names of Rogers and

its findings of fact or opinion or elsewhere; it did not, and we believe could not, question the *bona fides* of the details of these transactions or the reasonableness of the consideration supplied by the partnership. We, therefore, do not detail the evidence on these points.

Scharpf as officers being eliminated (R. 134-135, Pet. Exhs. 30, 31). The partnership, on January 18, 1941, filed an assumed business name certificate with the County Clerk, Lane County, Oregon, showing that it was doing business as Twin Oaks Builders Supply Company, and, as required by Oregon law, published notice to this effect (R. 36-37, 135-136, Pet. Exh. 19).

The partnership had some 30 employees (R. 129). Rogers and Scharpf headed the business, each performing the same general character of work he had performed, prior to 1941, for petitioner (R. 81, 133).⁶ All purchases of building supplies used in the course of the business and all sales were made by and in the name of the partnership and exclusively upon its credit. All income realized by the partnership was accounted for on its books and records and all debts and liabilities incurred in the business were accounted for and paid by the partnership (R. 45, 46, 193-195). Its dealings with petitioner were limited to the payment of rent, the renewal and final payment with interest, in December 1946, of its note for \$89,378.35, and one or two other incidental transactions unrelated to the lumber and building supply business (R. 33, 195-196, Pet. Exh. 10).⁷

⁶The Tax Court's findings of fact include the statement that "After January 1941 the lumber and builders supply business was conducted by Rogers and Scharpf as before; * * *" (R. 275). This is correct, as stated in the text, above, in that, as partners, they continued to head the business and perform the same general character of work. The court's statement would be patently incorrect and inconsistent with other findings if construed to mean that Rogers and Scharpf continued such duties as officers of petitioner or in any way through or for petitioner.

⁷The Tax Court's findings of fact include the statement without explanation that "The partnership has endorsed peti-

The net income of the partnership during its first four years, prior to allowance for the salaries of Rogers and Scharpf, was (R. 276; R. 31, 136, Pet. Exh. 5); 1941—\$29,776.20; 1942—\$18,525.29; 1943—\$42,086.52; and 1944—\$66,119.33.

Petitioner's activities beginning January 1941. Beginning January 1941, petitioner's activities were limited to owning and leasing real estate and equipment (R. 73-74). Its income for the years 1941-1944 consisted of the \$3,000 rent, interest on the partnership note and some very petty miscellaneous items. Its net income for these years was as follows: 1941—net loss of \$904.83; 1942—\$626.28; 1943—\$803.13; and 1944—\$419.57 (R. 30, Pet. Exh. 2). All income realized by petitioner was accounted for on the separate books and records of petitioner, and all debts and liabilities incurred by petitioner were accounted for and paid by it (R. 45, 181, 193-195).

In 1941, Rogers and Scharpf, as petitioner's officers, drew salaries of \$600 each. Thereafter, they drew no salaries. Petitioner had no other employees (R. 30, 51-52, 117, Pet. Exh. 2). In July 1941, petitioner bought a lot and an old frame residence adjoining its property in Eugene for between \$3,500 and \$4,000 and caused the building to be demolished. In December 1943, petitioner bought another lot and residence in Eugene for \$2,500. Both of these properties were added to the aggregate properties

tioner's notes for bank loans" (R. 276). This reference is limited to renewals of loans owed by petitioner to the Bank at the time of the transfer of the business in January 1941. The Bank insisted that the partnership endorse such renewal notes and, consistently with the January 1941 transaction, the partnership did so (R. 182-183, 186, 187, Pet. Exh. 37).

leased to the partnership, the former being used in the partnership business and the latter being rented (R. 122-124, 124-126, 143). As of the beginning of 1946, the partnership's rent under the lease from petitioner was increased to \$4,200 a year (R. 276; R. 35, Pet. Exh. 14).

Tax returns and claimed deficiencies. Petitioner filed corporation income and declared value excess profits tax returns for the years in question and paid the taxes shown to be due. The partnership filed tax returns reporting its income for these years and the members of the partnership, as required by law, reported their individual shares of the income and paid taxes upon it. The Commissioner thereafter determined deficiencies in *petitioner's* income and declared value excess profits taxes for the years 1942, 1943 and 1944 and excess profits taxes for 1943 and 1944 by including in petitioner's income the net income reported by the partnership, with certain adjustments. In justification, the Commissioner's theory was that the partnership, the transfer of assets and the lease were without substance and should be disregarded for federal tax purposes. On the same reasoning the Commissioner disallowed for 1942 petitioner's carryover of its operating loss of 1941. The Commissioner also determined penalties against petitioner for its failure to file excess profits tax returns for 1943 and 1944 (R. 276-277; R. 10-19, 196-199, Pet. Exhs. 38, 39, 40).

In addition, the Commissioner included in the personal net income of Rogers for 1943 and 1944 the share of the net income of the partnership distributable to and reported by Mrs. Rogers for these years, and asserted deficiencies in income taxes against Rogers on this basis

(R. 199, Pet. Exh. 42). Also, the Commissioner included in the net income of Scharpf for these years the share of the net income of the partnership distributable to and reported by Mrs. Scharpf and asserted deficiencies in income taxes against Scharpf on this same basis (R. 200, Pet. Exh. 43). Both Rogers and Scharpf made payments on account of the deficiencies asserted (R. 199, 200, Pet. Exhs. 41, 44).⁸

The Tax Court found the facts substantially as summarized above, with a few exceptions by way of facts added to or omitted from its findings as noted in the footnotes, pp. 11, 12, 16-17, 19.

Opinion and Decision of the Tax Court.

After again summarizing in its opinion certain of the facts set out above concerning the transfer of the business out of petitioner's hands (R. 278-280), the Tax Court, nevertheless, concluded that it did not "perceive substance in these forms" (R. 280) and characterized the transfer as "a scheme which had no substantive effect whatever on the business" (R. 281-282). Early in its opinion (R. 278) the Tax Court declared that "An arrangement whereby income is spread, as here, among members of family groups invites special scrutiny," citing *Helvering v. Clifford*, 309 U.S. 331, a family trust case. The

⁸These facts as to the deficiencies asserted against Rogers and Scharpf are not mentioned by the Tax Court. Reference is made to them in the Argument, *infra*, p. 35. The deficiencies asserted against Rogers and Scharpf were upon the theory that the partnership was to be recognized but that for tax purposes the income must be reallocated among the partners—a theory wholly inconsistent, of course, with that of the deficiencies asserted against petitioner (alone involved in the present case), which deny recognition to the partnership.

court did not question that, beginning in January 1941, the lumber and building supply business had in fact been conducted by the partnership or that the income in question was derived exclusively from such business. However, the court outlined certain of the testimony concerning the formation of the partnership, and the inclusion of Rogers' wife as a partner, and, without purporting to make a factual finding on the point, commented that this "testimony, in our opinion, affirmatively supports the respondent's view that the purpose of the partnership was to achieve a reallocation of income among family groups. The result was certainly accomplished, for the interests of the three shareholders were equally divided among the four spouses." (R. 283).

On this basis the Tax Court sustained the Commissioner in attributing to *petitioner* the income of the partnership. On the same basis it disallowed petitioner's operating loss carryover from 1941 to 1942. The court held against the Commissioner only as to the penalties proposed by him (R. 284).

Thereafter, the case came before the court for computation of the deficiencies, under the Tax Court's Rule 50. At this point the court refused to deal on the merits with petitioner's claim that, under the court's own holding, disregarding for tax purposes the partnership as a separate legal entity, petitioner's excess profits credit should be computed by including the invested capital and accumulated earnings and profits of the partnership. The court held that "as no issue was raised in the pleadings as to the computation of taxes under respondent's determination that the partnership should not be recognized,

none may be now raised and decided under Rule 50." (R. 326). Accordingly, decision was entered (R. 326) in the maximum amount stated in the deficiency notice, excepting only the penalties (*supra*, p. 1).

The findings of fact, opinion and decision of the Tax Court, as referred to above, were those of the single member of the court who heard the evidence. Following the entry of the findings and opinion on March 23, 1949 (R. 267-284), petitioner, on April 19, 1949, filed a timely motion for reconsideration and review of the case by the entire court, pursuant to the Tax Court's Rule 19 (R. 3, 284-285). However, orders were entered on April 25 and 26, 1949, denying the motion for reconsideration, and for review by the full court (R. 4).

SPECIFICATION OF ERRORS

The Statement of Points to be Relied on by Petitioner on Review (R. 339-344), to which reference is made, details the errors urged against the Tax Court.

The first 13 specifications are concerned with the fundamental error of the court (i) in deciding that there were deficiencies in petitioner's income taxes, declared value excess profits taxes and excess profits taxes in the amounts stated in its decision or in any amount (Item 1). More particularly, the court erred (ii) in attributing and taxing to petitioner the income of a separate legal entity, a partnership (Item 2), by deciding (iii) that the transfer of petitioner's business and the assets thereof, the lease of its real property, and the partnership itself were without substance and could not be recognized for federal tax purposes (Items 3, 4, 5, 8, 9), (iv) that after January 1, 1941,

the lumber and building supply business was conducted in the same manner and with the same assets as prior thereto (Items 6, 8), (v) that the partnership contributed nothing in services or capital to the production of the income from the business (Items 7, 10), (vi) that the business as conducted by petitioner prior to January 1941 was unitary in character and not susceptible of any logical division (Item 11), (vii) that the result of the transfer of the business to the partnership, and perhaps the purpose of the transfer, was to achieve a reallocation of income among family groups (Items 3, 12); and (viii) in purporting to determine for tax purposes the status of the partnership and the relationship of the individual partners among themselves, in a proceeding to which neither the partnership nor the individual partners are parties and which does not present these issues (Item 13).

The foregoing specifications of error are involved in the first question presented (*supra*, p. 6) and are dealt with in Point I of the Argument (*infra*, pp. 24-50).

The remaining two specifications are concerned with the errors of the Tax Court, with respect to the computation of the deficiencies for purposes of entering its decision, in (ix) entering as its decision the computation of deficiencies submitted by the Commissioner, and in refusing to enter as its decision the computation submitted by petitioner (Item 14), and (x) holding that the right to object to the method of computing such deficiencies employed by the Commissioner had been waived by petitioner (Item 15).

The specifications of error outlined in the next preceding paragraph are involved in the second question presented (*supra*, pp. 6-7), and are dealt with in Point II of

the Argument (*infra*, pp. 51-61). These specifications need not be considered unless the Court holds with the Commissioner on the first 13 specifications.

SUMMARY OF ARGUMENT

Point I of the Argument deals with the fundamental question of whether there can be attributed and taxed to petitioner the earnings of the partnership. Our position on this question has been summarized under the Substance of the Controversy, *supra*, pp. 2-6, and is put briefly at the beginning of Point I, *infra*, pp. 24-25. The Argument is developed under the following headings:

Petitioner Did Not Conduct the Business Which Produced the Income in Question. There Is No Legal Basis Upon Which Such Income Can Be Taxed to Petitioner.

A. The Controlling Law.

The *Gregory v. Helvering* qualification.

The significance of motive.

The internal organization of the partnership.

B. Cases Dealing with Similar Fact Situations.

C. Application of the Law to the Facts.

It will be unnecessary for the Court to consider Point II of the Argument unless it agrees with the Commissioner on Point I. Only in that event is the Court required to decide whether, as we contend, the Tax Court compounded its first error by attributing the partnership income to petitioner but at the same time denying it the credits against such income to which it would be entitled if the earnings of the partnership did belong to it. This point is treated under the following headings:

The Tax Court Erred in Failing to Include, When Computing Petitioner's Excess Profits Credit for 1943 and 1944, the Invested Capital and Accumulated Earnings and Profits of the Partnership as of the Beginning of Each of These Taxable Years.

- A. The Error in Computing the Credits.
- B. Petitioner Did Not Waive a Correct Computation of Its Taxes.

Finally, Point III of the Argument contains a very brief discussion of the scope of review in Tax Court cases. The present is not a "fact" case, the Court's review being essentially a re-examination of the applicable law. This topic is included primarily for the sake of the completeness of the discussion.

ARGUMENT

I.

Petitioner Did Not Conduct the Business Which Produced the Income in Question. There Is No Legal Basis Upon Which Such Income Can Be Taxed to Petitioner.

Two fundamental principles of taxation control the present case: The revenue laws do not, and constitutionally could not, tax A (here, petitioner) on income earned by B. Persons are entitled to conduct a business in any way they choose, being held to the tax consequences of the manner in which they actually handle their affairs (Subsections A and B, *infra*).

Applying these principles to the uncontradicted facts, set forth *supra*, pp. 8-19, it is clear that petitioner, in January 1941, withdrew from the lumber and building

supply business here involved. Thereafter this business was conducted not by petitioner but by a separate legal entity. This entity happens to have been a partnership, but whether it was a partnership, a sole proprietorship, another corporation, or some business entity known only to the local law, is immaterial. The point is that it was not petitioner which conducted the business. Factually, or economically, it was the work of the partners, as partners, and their employees, and the credit and property of the partnership, which generated the income here in dispute. The corporation did not conduct the business and did not produce the income. Therefore, the income cannot be attributed to the corporation (Subsection C, below).

This is the sum and substance of the case.

A. THE CONTROLLING LAW.

The Gregory v. Helvering qualification. The Commissioner is not likely to dispute, in terms, the principles just referred to, that A cannot be taxed on the income of B and that persons are free to choose the method of doing business which they desire. He must rely, rather, on the qualification, inherent in these principles, that the tax laws look to substance rather than to form, and that if income which appears to be that of A is factually and economically attributable to B, then B may fairly be taxed upon it. Typical cases which may be cited for this qualification are *Gregory v. Helvering*, 293 U.S. 465; *Helvering v. Bashford*, 302 U.S. 454; *Higgins v. Smith*, 308 U.S. 473; *Commissioner v. Court Holding Co.*, 324 U.S. 331; *Lucas v. Earl*, 281 U.S. 111; *Helvering v. Horst*, 311 U.S. 112; and *Harrison v. Schaffner*, 312 U.S. 579. This line of cases stands for the rule that "In tax matters the realities of a

transaction, not artificialities, are given effect'' (*Nordling v. Commissioner*, 166 F.2d 703 (9th Cir.), certiorari denied, 335 U.S. 817). We have no occasion to dispute this rule. Instead, we emphasize it in the interest of a correct analysis of the present case.

The first four cases above cited dealt with isolated, transitory transactions which were conducted in such a manner as to create an appearance which did not correspond with reality; the apparatus employed, such as the dummy corporation used as a conduit in the *Gregory* case, served no economic function and generated no income.⁹

The next three cases, beginning with *Lucas v. Earl*, *supra*, involved anticipatory arrangements whereby, in the familiar language of that case (281 U.S. at p. 115), "the fruits are attributed to a different tree from that on which they grew."¹⁰

None of these cases dealt with factual situations which even remotely resemble the instant case. As applied here, these cases limit the field of inquiry to the question: Can it fairly be said that the corporation produced the income of the business?

⁹*Gregory v. Helvering* (transfer of securities to taxpayer-stockholder via corporation which was organized to serve as conduit and was thereafter immediately dissolved); *Helvering v. Bashford* (X corporation held not a party to a reorganization because its ownership of securities was (p. 458) "transitory, and without real substance"); *Higgins v. Smith* (taxpayer-stockholder did not effect surrender of securities by transferring them to controlled corporation); *Commissioner v. Court Holding Co.* (corporation used its stockholders as mere conduit in sale of its assets).

¹⁰*Lucas v. Earl* (husband by contract sought to attribute one-half of earnings to wife); *Helvering v. Horst* (father sought to attribute interest-income to son by transfer of bond coupons); *Harrison v. Schaffner* (assignment by life beneficiary of income of trust).

Where the rule of the foregoing cases is applicable, it has usually been a corporate entity which has been deemed fictitious and ignored rather than some other type of business entity, like, as in this case, a partnership. We assume, as did the Tax Court in *Seminole Flavor Co.*, 4 T.C. 1215, 1234, that, when appropriate, business entities other than corporations are similarly to be disregarded and that the test is essentially the same. The holdings and reasoning of the above-cited cases make it manifest, however, that this line of authorities provides simply a qualification of the general principles of taxation. "In tax matters it is only under exceptional circumstances that the separateness of the corporation from the stockholders can be disregarded, even when there is but one stockholder." *Ross v. Commissioner*, 129 F.2d 310, 313 (5th Cir.).¹¹

In several situations this Court has had occasion to draw a line excluding application of the *Gregory v. Helvering* doctrine. *Samson Tire & Rubber Corporation v. Rogan*, 136 F.2d 345 (9th Cir.), certiorari denied, 320 U.S. 770 (*bona fides* of taxpayer's sale of tires and tubes sustained, contrary to Government's contention); *Guaranty Trust Co. v. United States*, 139 F.2d 69 (9th Cir.) (second transaction—bank held to be the substantial party to the transaction rather than the holding company, as contended by the Government). Similarly, this Court has held that A, an assignor, could not be taxed on the income of B, an assignee (even though, unlike the present case, B did not conduct a business or otherwise contribute to the production of the income), where the assignment did not con-

¹¹The *Seminole Flavor* and *Ross* cases, both holding for the taxpayer, are discussed, *infra*, pp. 37, 38.

stitute a mere attempt to shift income but involved the income-producing corpus itself. *United States v. Spalding*, 97 F.2d 701 (9th Cir.), certiorari denied, 305 U.S. 644 (assignment of interest in oil permit). Here, this Court applied the decision in *Blair v. Commissioner*, 300 U.S. 5 (income taxed to transferee, not transferor, as contended by Commissioner, where transfer involved equitable interest in the trust).

The significance of motive. Several of the *Gregory v. Helvering* line of cases have considered the significance to be attributed evidence as to the taxpayer's motive in the transaction under review: If the thing which was done had substance in that factual or business consequences, apart from or in addition to tax results, attached to it, *then a tax-saving motive is immaterial*. When, but only when, the thing done appears to be without substance, or otherwise *equivocal*, can the questions of motive and purpose be explored for the light which they may throw upon the true nature of the transaction. *Gregory v. Helvering*, 293 U.S. at p. 469;¹² *Brunton v. Commissioner*, 42 F.2d 81, 82 (9th Cir.), certiorari denied, *sub nom.*, *Brunton v. Burnet*, 282 U.S. 889.¹³

¹²The Court there said:

"* * * if a reorganization in reality was effected within the meaning" of the statute, the tax motive "will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. * * * But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended."

¹³In the *Brunton* case, this Court declared:

"It is to be conceded that the contract is not to be deemed ineffectual merely because the purpose of the decedent may have been to avoid the heavier tax rate of 1921.

This Court again employed the same approach in holding for the taxpayer in *Samson Tire & Rubber Corporation v. Rogan*, 136 F.2d at p. 347:

"One purpose of the agreement between appellant and Products was to avoid the imposition of excise taxes on tires and tubes manufactured by appellant before June 21, 1932. That was a legitimate purpose. * * *

"The court [below] did not find that the agreement between appellant and Products was unreal or a sham, nor did the evidence warrant such a finding. The court found that the agreement served no business purpose, but that finding is clearly erroneous. The evidence shows that the agreement had a business purpose, namely, to sell the merchandise, including tires and tubes, described in the agreement at the price and on the terms specified therein, and that that purpose was accomplished."¹⁴

Similarly, the Tax Court, in dealing with cases involving the identical question presented here of whether a corporation could be taxed on the income of a separate

* * * But in interpreting an *equivocal* transaction motives may be considered as *bearing on the real nature thereof*." (Italics ours.)

In this connection, the Court cited *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U.S. 548, a nontax case, in which the Supreme Court observed (at p. 559):

"Motive is a persuasive interpreter of *equivocal* conduct, and the petitioners are not entitled to complain because *their activities were viewed in the light of manifest interest and purpose*." (Italics ours.)

¹⁴To the same effect as to business purpose and motive are, among many other cases which might be cited: *Commissioner v. Kolb*, 100 F.2d 920, 926 (9th Cir.); *Commissioner v. Gilmore's Estate*, 130 F.2d 791, 795-796 (3d Cir.); *Commissioner v. H. P. Hood & Sons*, 141 F.2d 467, 471 (1st Cir.), quoting Mr. Justice Holmes in *Bullen v. Wisconsin*, 240 U.S. 625, 631.

business entity, has employed this same reasoning. *Seminole Flavor Co.*, 4 T.C. 1215, 1231, 1235; *Buffalo Meter Co.*, 10 T.C. 83, 88-89; *Miles-Conley Co.*, 10 T.C. 754, 762, affirmed as to another issue, on taxpayer's appeal, 173 F.2d 958 (4th Cir.). These cases, all holding for the taxpayer, are discussed *infra*, pp. 38-40. At this point, however, it is pertinent to note the following reasoning of the Tax Court's opinion in the *Buffalo Meter Co.* case (10 T. C. at pp. 88-89):

"The partnership here was in no sense 'unreal or a sham'. *Higgins v. Smith*, *supra*. As to the assets which it acquired from the petitioner [the corporation], there was a complete shift of economic interests from the corporation to the partners. It was none the less so because the partners were, and continued to be, corporate stockholders. * * *

"The partners had what in their opinion were sound business reasons for organizing the partnership. *The important consideration is that the partnership was real for all purposes and that it has at all times functioned as an entirely separate economic entity.*" (Italics ours.)

It is to be seen that the Tax Court in the above cases faithfully applied the analysis provided by the Supreme Court and this and other Courts. Manifestly, the single judge of the Tax Court in the instant case failed to employ the same approach.

A striking confirmation of the foregoing cited cases as to the significance of motive, and the scope of the *Gregory v. Helvering* doctrine, is provided by the very recent case of *United States v. Cumberland Public Service Company*, decided by the Supreme Court on January 9, 1950 (opinion

by Mr. Justice Black for a unanimous Court). Distinguishing *Commissioner v. Court Holding Co.*, *supra*, on its facts, the Court held that the sale of assets involved in the *Cumberland* case was made by the stockholders themselves and not by or for the corporation, which had distributed the assets to its stockholders immediately prior to the sale. The Court, therefore, sustained the decision of the Court of Claims, holding that the corporation was not taxable on the sale. The Supreme Court noted the Court of Claims' finding that the method by which the stockholders disposed of the property "was avowedly chosen in order to reduce taxes," but concluded its discussion of this subject with the statement: "Whatever the motive and however relevant it may be in determining whether the transaction was real or a sham, sales of physical properties by shareholders following a genuine liquidation distribution cannot be attributed to the corporation for tax purposes."¹⁵

The Tax Court's opinion in the present case contains practically no discussion or analysis of the doctrine of *Gregory v. Helvering*. In its findings of fact, as noted *supra*, p. 11, it included no finding as to the motives behind the transfer of the business out of petitioner's

¹⁵As mentioned, the instant decision affirmed the decision of the Court of Claims. The Supreme Court, however, reviewed the decision below to determine whether the factual findings were adequately supported by the evidence and whether the correct rules of law had been applied. The statement as to motive, quoted above, is obviously a legal rule, of general application, which neither the Court of Claims nor any other court is free to disregard.

The case presently before this Court requires no extended discussion of the scope of appellate review in Tax Court cases. A brief comment upon the subject is found under Point III, *infra*, pp. 61-62.

hands. The Tax Court's opinion, however, does mention certain of the testimony relating to the matter, although the court appears less concerned with the transfer of the business from petitioner to the partnership than with the internal organization of the partnership itself. In this connection, the court mentions Scharpf's testimony that he wanted "a decent share of the profit" and the testimony as to the inclusion of Rogers' wife in the partnership. The court then comments that this testimony affirmatively supports the Commissioner's "view," and that the "result" was to divide the interest of petitioner's three shareholders among the four spouses (R. 283).

The Tax Court's preoccupation with the internal organization of the partnership is briefly considered, *infra*, p. 33. At this point it is sufficient to emphasize: (1) The uncontradicted evidence shows that tax considerations played no part whatsoever in the transfer of the business from petitioner to the partnership. Petitioner's income from the business, indeed, had been so slight in the years prior to 1941 as to make this understandable even in the absence of explicit testimony (*supra*, p. 9). And the partnership was urged by Scharpf well before the excess profits tax, to which the bulk of the total deficiency is due, had been adopted (fn. 2, *supra*, p. 11).

(2) On the present record a tax-saving motive, even had it existed, would be irrelevant under the decisions previously considered, including the recent decision of the Supreme Court in the *Cumberland* case. For here there was a genuine transfer of the business to the partnership, which thereafter produced the income in dispute. The partnership actually functioned, and has been functioning since January 1941; the business was conducted by the

partnership, with all the incidents thereof, including personal liability of the partners; there was a complete satisfaction of the business purpose requirement under *Cumberland, Samson, Kolb, Gilmore's Estate, Hood* and other cases. On the facts there was nothing *equivocal* which the motives of the parties could illumine.

The internal organization of the partnership. It appears that the Tax Court's emphasis upon the internal organization of the partnership, such as the distribution among the four partners of the earnings of the business, influenced its decision in the case. Apart from what has already been noted, *supra*, p. 20, the Tax Court pointed out that Mrs. Rogers and Mrs. Scharpf, in addition to their one-fourth interests in the profits of the partnership after salaries, each received \$25 a month as a "salary" (R. 273). Three times in its opinion the court mentioned the compensation of the partners (R. 280, 281, 283), characterizing the wives' services as "negligible" (R. 281). The court's conception seems to have been that the internal organization of the partnership was such as to distort the amounts of income received by the respective partners, and that *this* justified it in taxing the partnership's earnings to *petitioner*.

It could be replied that, according to the uncontradicted evidence, the wives in fact did render services to the partnership, in signing the semi-monthly payroll checks and listing accounts receivable (R. 128-129, 160); and that if their services were "negligible," so were their salaries of \$300 each a year. It could also be argued that the partnership's distribution of net income, after salaries, corresponded more nearly to economic fact than did such distribution when the business was conducted by peti-

tioner, prior to 1941. As we have seen, Rogers and Scharpf were at all times the active heads of the business. Yet, as owner of 437.7 shares in petitioner (*supra*, p. 8), Mrs. Scharpf was thereby entitled to about 45% of the net earnings of the business when conducted by petitioner. As a result of the arrangement among the partners, Mrs. Scharpf's interest was reduced to only 25% of the net earnings of the business, after 1940, when it was conducted by the partnership. Scharpf's share, as an active head of the business, was proportionately increased from less than 5%, as the owner of only 35.3 shares in petitioner, to 25%. This, if a very faint touch of humor may be injected, should have delighted the Commissioner rather than brought down his wrath.

Mrs. Rogers was not a stockholder in petitioner but did obtain a one-fourth interest in the partnership upon payment of her aliquot contribution. It is to be remembered, nevertheless, that, in view of the meager earnings of the business prior to 1941, a one-fourth interest in the partnership could easily have turned out to be worth less than what she paid for it, that this interest subjected her to personal liability for the debts of the enterprise, and, more important, that it was Scharpf, not Rogers, who pressed for the transfer of the business to the partnership (*supra*, pp. 10-12).¹⁶

However, we respectfully decline the invitation to become involved in any argument concerning family partnerships. As we have emphasized above (*supra*, pp. 6, 24-25), the present case does not concern the proper allocation

¹⁶It may be noted that the Tax Court's decision in the instant case was prior to the remand to the Tax Court by the Supreme Court of the family partnership case of *Commissioner v. Culbertson*, 337 U.S. 737.

of the earnings of the partnership among the respective partners, but the wholly different question of whether such earnings can be taxed to petitioner. To the latter question the former is irrelevant. This is clear in principle and has been implicitly so regarded in every other decision which we have found. The Commissioner has zealously preserved the question of whether Rogers and Scharpf can be taxed upon the shares of the partnership's earnings distributable to their respective wives by serving appropriate deficiency notices upon them (*supra*, pp. 18-19). This action the Commissioner has taken although his theory in proceeding against Rogers and Scharpf is necessarily inconsistent with his theory here in attempting to allocate the earnings of the business to *petitioner* and therefore adversely reflects, *pro tanto*, upon the validity of his position before this Court.¹⁷

¹⁷As demonstrated by the following computation for the year 1944, the Commissioner, by concurrently pursuing contradictory theories, seeks to collect substantially 100% of the combined net income of petitioner and the partnership:

		Amount
Income:		
	Taxable income of petitioner (R. 18).....	\$ 559.42
	Taxable income of partnership (R. 31, Pet. Exh. 5).....	66,119.33
		<u>\$66,678.75</u>
Federal income taxes asserted:		
As to petitioner (R. 19, 326):		
	Income tax previously paid.....	\$ 139.85
Deficiencies asserted.....	{ Income tax.....	4,532.68
	{ Declared value excess profits tax.....	6,565.25
	{ Excess profits tax.....	24,562.88
		<u>\$35,800.66</u>
Amounts As to partners (R. 199, 200,		
include deficiencies asserted	Pet. Exhs. 41, 42, 43, 44):	
	{ John J. Rogers.....	\$15,382.89
	{ Louis C. Scharpf.....	15,459.50
		<u>\$30,842.39</u>
Total tax asserted on above income.....		\$66,643.05
Recapitulation:		
	Taxable income (above).....	\$66,678.75
	Taxes asserted (above).....	66,643.05
		<u>\$ 35.70</u>
Excess of income.....		\$ 35.70

In reallocating the wives' shares of partnership income to their husbands, the Commissioner undertook to refund to the wives the

The point, in any event, is that any question of the proper allocation of the partnership's earnings among the four partners must remain open for decision on another day and in another case, to which Rogers and Scharpf, respectively, are parties. The issue in the present case is not whether the income of the partnership is taxable entirely to two of the four partners; it is whether the income of the partnership is taxable *to the corporation*. The Tax Court judge evidently thought of this case as a family partnership case, and thus was led to decide it on an issue not before him.

B. CASES DEALING WITH SIMILAR FACT SITUATIONS.

We have examined the controlling body of law in considerable detail under A, *supra*, partly because of the scarcity of cases dealing with an attempt to impute to a corporation the income of a separate business under facts even remotely similar to those of the instant case. The few pertinent cases which have been decided hold for the taxpayer; and, as we shall see, in various respects some of these cases present circumstances which might seem more favorable to the Commissioner than anything in the present case. On the other hand, the cases which have gone for the Commissioner are so far afield as to require scant attention.

tax each had paid upon her share of such income (R. 197-198, Pet. Exhs. 38, 39). The taxes paid by the wives and thereafter refunded to them accordingly cancel out; these amounts are not included within and do not affect the above computation.

Assuming that the limitation period has not run, Rogers and Scharpf may file claims for refund and contest the Commissioner's allocations of the wives' partnership incomes to them, but only in further proceedings with their attendant expense and delay.

Ross v. Commissioner, 129 F.2d 310 (5th Cir.), involved an attempt by the Commissioner to impute to a corporation the earnings of a partnership conducted by its stockholders. The corporation was engaged in the business of selling horses and mules at auction, on commission, at the same time that the partnership was engaged in the business of buying and selling horses and mules for its own account. The four partners worked at the same time for the corporation, without separation of their working hours; in this and other respects the business of the corporation and the partnership were entangled in a manner wholly lacking in the present case. Reversing the Tax Court, the Fifth Circuit held for the taxpayer on the fundamental proposition that the earnings of the partnership were produced by it. The Commissioner did not petition for certiorari.

Epsen Lithographers, Inc. v. O'Malley, 67 F. Supp. 181 (D. Nebraska), is in many respects similar on its facts to the present case. A father and elder son owned all of the stock of the taxpayer-corporation, which for several years had conducted a lithographing business. The corporation withdrew from the business and leased to a partnership, composed of the father and son, this son's wife, and two other sons, all of its physical property, equipment and machinery. The partnership took over the name formerly used by the corporation and thereafter conducted the business. Refusing to allocate the income of the partnership to the corporation, the court pointed out that the income in question was produced in fact by the partnership, through the efforts of the partners. The Government did not appeal.

In *Seminole Flavor Co.*, 4 T.C. 1215, the corporation had previously manufactured, advertised, sold and supervised the bottling of its flavored extracts. Thereafter, it continued the manufacturing end of the business, but the advertising, merchandising and supervisory services were handled under contract by a partnership composed of its stockholders, whose interests in the partnership were identical with their stock interests in the corporation. The Tax Court agreed with the Commissioner that (p. 1233) "Whether any such business agreement would have been entered into by petitioner [the corporation] with total strangers is wholly problematical." The court nevertheless held for the taxpayer on the ground that the earnings of a separate business were involved. The Commissioner did not appeal.

Buffalo Meter Co., 10 T.C. 83, involved a corporation which continued to conduct a foundry business but transferred to a partnership, composed of its stockholders, the manufacturing and selling division of the business. The court refused to allocate the earnings of the partnership to the corporation, and the Commissioner did not appeal.

Similarly, *Miles-Conley Co.*, 10 T.C. 754, affirmed as to another issue, on taxpayer's appeal, 173 F.2d 958 (4th Cir.), involved a corporation engaged in the produce business, which, while continuing to engage in the remainder of the business, transferred its dealings in vegetables to its controlling stockholder. This stockholder handled the vegetable business as a sole proprietor, sharing rented space and other facilities with the corporation and also sharing the services of certain of the corporation's em-

ployees. Holding for the taxpayer-corporation, the court said, in part (p. 762) :

“Respondent contends that the instant case can be distinguished from *Seminole Flavor Co.*, *supra*, in that the sole proprietorship of Carlisle Miles & Co. was not organized and operated for a definite business purpose. As we have pointed out, respondent does not deny that A. Carlisle Miles, a living individual, organized and operated a business under the name of Carlisle Miles & Co. with his own money and his own efforts. It is not suggested that A. Carlisle Miles, doing business as Carlisle Miles & Co., should be disregarded as a sham. While it is difficult to follow the argument on this point, it seems to be respondent’s position that no business purpose of the corporation was served by reason of its relinquishment of a part of its business and its permission to its sole stockholder to conduct the business thus relinquished in his individual capacity, that it will therefore be considered that the corporation did not relinquish any part of its business, and that when A. Carlisle Miles purported to carry on the part of the business purportedly relinquished he was doing so only as an agency or department of petitioner.

“In our opinion this position does not represent a realistic appraisal of the facts. It ignores what was done and relies too much on what might have been done, or what should have been done.”

The Commissioner did not appeal.

We particularly commend to this Court the opinion in the *Miles-Conley Co.* case, which precisely analyzes the body of law discussed under A, *supra*, and faithfully applies it to the facts.

The *Miles-Conley Co.* and *Buffalo Meter Co.* cases were both reviewed by the full Tax Court. Because of this, as well as the reasoning of their opinions, these cases command greater persuasive force than does the opinion and decision of the single judge in the present case. Indeed, in the light of these two cases, both decided as recently as 1948, it is difficult to believe that the full Tax Court, on review, would have countenanced the present decision.¹⁸

It is not to be supposed that the Commissioner's effort in the present case to allocate to a corporation the earnings of a partnership forms a piece of any consistent pattern of governmental activity in tax cases. Taxwise, there are advantages and disadvantages in doing business either in corporate or partnership form. A corporation pays corporate taxes, but its earnings are not taxable to its shareholders until distributed to them. A partnership pays no partnership taxes, but its net earnings are taxable to its partners in accordance with their respective shares whether or not such earnings are distributed to them.¹⁹ This means that in some cases, unlike the instant case, the Government's tax collections will be increased by attributing the earnings of the business to a partnership or sole proprietorship rather than to a corporation. Such a case was *Paxson v. Commissioner*, 144 F.2d 772 (3rd Cir.), wherein the Commissioner, with the approval of the Tax Court, sought to tax to an individual, the general manager of the corporation, what in substance were the earnings of the corporation. Reversing the Tax Court,

¹⁸There are other Tax Court cases holding for the taxpayer, some of which are cited *infra*, p. 49.

¹⁹Section 181, Internal Revenue Code, 53 Stat. 69, 26 U.S.C. Sec. 181.

the Third Circuit applied the same test employed in the cases just considered.

The cases holding for the Commissioner can be disposed of summarily. The single judge apparently considered *R. O. H. Hill, Inc.*, 9 T.C. 153; *Forcum-James Co.*, 7 T.C. 1195; and *Broadway Strand Theatre Co.*, 12 B.T.A. 1052, most closely in point, for these are cited in his opinion (R. 282).²⁰ *R. O. H. Hill, Inc.*, *supra*, was a flagrant case in which the stockholders attempted to appropriate to themselves, as partners, the earnings of the corporation's most profitable business line, the printing of "E" award programs. The partnership had no office, no telephone, etc. The rationale of the case and its remoteness from the facts of the instant case are adequately shown by the following from the Tax Court's opinion (9 T.C. at p. 157):

"The record shows clearly that the partnership contributed absolutely nothing either in services or capital to the production of the income arising from the executing of orders for 'E' award printing. Its capital was \$150, which was little more than half of the amount expended in attorney fees for the work incident to the technical creation of a partnership and its contract arrangement with petitioner. It obtained no business, bought no supplies, and did no work. It is clear to us that its function and purpose were merely to siphon off the greater portion of the earnings derived by the petitioner."

Likewise, *Forcum-James Co.*, *supra*, involved a partnership which had no offices of its own, no employees and did

²⁰In addition, the opinion cites for comparison *Ingle Coal Corporation*, 10 T.C. 1199. That case held certain payments to shareholders to be a distribution of profits and not deductible as royalties.

no work. Such books as it had were kept by the corporation; the income of the excavation project involved was patently that of the corporation. And *Broadway Strand Theatre Co., supra*, was similarly transparent. The theatre business was conducted by the corporation rather than by its controlling stockholder as an individual. Indeed, the corporation's own witnesses testified that the corporation was continued in order to hold the theatre lease and to protect the controlling stockholder against personal liability.

This concludes our discussion of the cases holding for the Commissioner which were cited in the Tax Court's opinion.

Several of the cases cited above contain discussions of the application of Section 45, Internal Revenue Code, 53 Stat. 25, as amended by the Act of February 25, 1944, 26 U.S.C. Section 45, which provides as follows:

"In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Commissioner is authorized to distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses." ²¹

²¹The Act of February 25, 1944, Title I, Sec. 128(b), 58 Stat. 48, cited to text, amended this section by striking out "gross income or deductions" and inserting in lieu thereof "gross income, deductions, credits, or allowances."

We, therefore, briefly consider the application of this section to the present case.

At the opening of the hearing in the present case the trial counsel for the Commissioner said (R. 28):

“The determination in this case is not predicated upon Section 45 of the Internal Revenue Code, which relates to the election as between one taxable entity and another, and certain items of income and certain items of deduction in order to determine the true income. The determination here is that the alleged partnership is without substance and should be disregarded, and therefore there is no taxable entity for the purpose of recognition, or the application of the provisions of Section 45.”

Counsel immediately added (R. 28), “However, I did not mean to undertake, if I could, to waive any provision of Section 45 or any other section of the Code * * *.”

Similarly, the Tax Court did not invoke Section 45 in reaching its determination (R. 284); as previously indicated, it cited Section 45, for the purpose of excluding that section, and cited no other statutory provision.

The Commissioner's trial counsel at the hearing, in the language quoted above, correctly pointed out that Section 45 subsumes the existence of two or more separate entities, recognized as such in administering the revenue laws. See *Ross v. Commissioner*, 129 F.2d at p. 313; *Seminole Flavor Co.*, 4 T.C. at pp. 1231-1232; and *Miles-Conley Co.*, 10 T.C. at pp. 761-762. On the contrary, the Commissioner's theory in the present case, as approved by the Tax Court, is that the partnership does not exist and is to be wholly disregarded for tax purposes.

For these reasons and others, which it is unnecessary to discuss, Section 45 is not further argued in this case.

C. APPLICATION OF THE LAW TO THE FACTS.

The issue in this case is a simple one—whether A is to be taxed on B's income. The corporation and the partnership here involved were separate and distinct entities, each having a genuine and real existence. The income of the business was produced by the partnership, it belonged to the partnership, and it was not factually or legally income of the corporation.

This is not a case like *Gregory v. Helvering, supra*, where a new entity was brought into transitory existence for the sole purpose of creating an appearance differing from reality—a mere sham and fraud, disappearing as soon as its object of concealment and deception was served. The partnership here actually purchased and took over the business, actually conducted it and is still conducting it.

Nor is this a case like *Lucas v. Earl, supra*, where a taxpayer attempted to assign or attribute income to someone other than the real producer thereof. The income here was produced by the partnership—by the exertions of its members and the use of its property.

This case involves a very common type of transaction—the conversion of a business from the corporate method to the partnership method of operation. Hundreds of corporations are converted into partnerships every year. Other hundreds of partnerships are converted into corporations. No one has ever supposed that such transactions were to be disregarded for tax purposes.

The present case differs in no material respect from a host of such every day conversions. If the corporation here had been completely liquidated and dissolved, certainly no one could have been taxed except the partners. If the corporation had transferred *all* its assets to the partnership, but had remained in existence as an empty shell, the same answer would surely follow. If the corporation transferred all assets except real estate, and continued to exist only for the purpose of holding that real estate, what possible reason is there for a different answer? It would be a strange rule of law that would require taxpayers, in converting a business from corporate to partnership operation or vice versa, to transfer all assets to the new entity and retain none in the old. There is no such rule, and there is no decision, basing tax consequences on any such arbitrary and senseless distinction.

What, then, led the Tax Court judge to decide the case as he did? In analyzing his opinion, we find that he appears to have been influenced chiefly by two factors: first, that the business conducted by the partnership was in many respects similar to the business conducted by the corporation (R. 278-282), and, second, that the income of the partnership was distributable differently from the income of the corporation (R. 283-284). Let us consider each of these factors.

First, as to the similarity between the business as conducted by the corporation and as conducted by the partnership. As the judge points out in his opinion, in general the business was conducted with the same assets and by the same people after it was transferred to the partnership as before. The business was also conducted under

the *former* name of the corporation. This is the normal state of affairs when a business is changed from corporate to partnership operation or vice versa. No court has ever held before that such similarity before and after the conversion should result in disregarding the conversion for tax purposes.

In actual fact, the differences between the corporation and the partnership here were *greater* than in the normal case. There was the usual difference that the stockholders, whose liability had been limited, assumed the unlimited liability of partners. But there was also the difference that \$8,000 of additional capital was contributed, being the approximate amount of the average borrowing requirements. There was the difference that the wives, who had previously performed no services, began to perform some services, however "negligible." There was the difference that Mrs. Rogers, who had no interest in the corporation, became a partner, entitled to one-fourth of the profits if the business was successful, but also subjecting her personal holdings to unlimited liability for losses if it was not. There was the difference that Mr. Scharpf, who previously had a minor interest in the profits, now had a substantial interest, which was one of the things he wanted when he began to urge the formation of the partnership. And there was the difference that Mr. Scharpf now had the means of getting his investment out whenever he wished, which was the other thing he wanted.

If differences were necessary between the corporate operation and the partnership, there were plenty of differences. But no differences were necessary. We could stand flatly on the proposition that partners may incorpo-

rate their business, and the stockholders of a corporation may convert its business to a partnership operation, without *any* difference other than those inherent in the two different forms of business organization.

Second, the judge stressed the fact that the income of the partnership was distributable in a different manner than the income of the corporation. The judge thought this was a "bad" factor, which seems inconsistent with his other theory that there should have been more difference between the corporation and the partnership. Here was a very important difference: there was one partner who had not been a stockholder, and the proportionate interest of every partner was different from his proportionate interest as a stockholder. Ordinarily a court would regard such differences as making it difficult if not impossible to ignore the separate entities of the corporation and the partnership. But the judge below actually assigned it as a reason, and probably his most important reason, for ignoring the separate entity of the partnership.

Why did the judge below draw this unusual conclusion? It was evidently because he was mistakenly thinking of this case as a family partnership case.

Prior to the Supreme Court's recent decision in *Commissioner v. Culbertson*, 337 U.S. 737, the courts had gone to great lengths in denying tax recognition to family partnerships, i.e., in taxing the income of such partnerships entirely to the husbands if the wives contributed no significant capital or services. The language which the courts used in these cases was similar to that used by the judge below throughout his opinion: no change in the manner of conducting the business, no new capital, no

services or "negligible" services rendered by the wives, reallocation of income within family groups, and so on.

Since the judge below rendered his decision, the Supreme Court in the *Culbertson* case has caused a shift in emphasis, and has said that family partnerships are to be recognized for tax purpose if the parties had a *bona fide* intent to form a partnership. But that is not the point here. This is not a family partnership case. The issue here is not whether the partnership income is to be taxed entirely to the husbands or taxed partly to the wives; it is whether it is to be taxed *to the corporation*.

The judge below decided this case on the rationale of old family partnership decisions which are no longer the law. But when they were the law, the issue with which they were concerned was an issue foreign to this case. The husbands and wives are not parties to this case, and it does not matter here which of them are taxable on the income. The only issue in this case is whether the income is taxable to the corporation.

Except for his references to reallocation of income among family groups, the judge below made no comment as to any tax saving motive, and could have made none consistently with the record. The uncontradicted evidence is to the effect that tax saving played no part in the formation of the partnership, that its formation had been discussed long before the adoption of the excess profits tax law and at a time when the earnings of the business were such as not to make a tax saving likely, and that it was the result of Mr. Scharpf's desire for a change in his status.

But if tax saving had been one of the motives, that would be immaterial where, as here, there was a genuine and unequivocal transfer of the business to the partnership. That is made clear by many decisions of this and other courts, climaxed by Mr. Justice Black's recent expressions in the *Cumberland* case, *supra*.

The single judge made no finding of ultimate fact adverse to petitioner but in his opinion sought to characterize and comment upon certain segments of the uncontradicted evidence. In this connection, the single judge commented that petitioner's business, as conducted prior to 1941, "was unitary in character" (R. 282). This observation was made in an effort to distinguish the *Miles-Conley Co.*, *Buffalo Meter Co.* and *Seminole Flavor Co.* cases, *supra*. Apparently, the judge was here taking the view that, as a matter of law, "unitary" business cannot be divided between a corporation and a partnership, and that the lumber and building supply business is such a unitary business. But there is no such proposition of law, and the *Broadway Strand Theatre Co.* case, *supra*, cited by the court, does not, as we have seen, so hold.²² Moreover, as a matter of fact, the present business was not divided between petitioner and the partnership, but was wholly

²²In addition to the divisions of the businesses involved in the cases cited, *supra*, pp. 37-39, reference may be made to *Fair Price Stations, Inc.*, 5 T.C.M. 401, decided May 23, 1946 (corporation retained gasoline distribution franchise, partnership operated retail gas station); *Barq's Bottling Company*, 5 T.C.M. 505, decided June 21, 1946 (corporation continued to manufacture products, partnership sold them); and *Standard Fruit Products Co.*, 8 T.C.M. 733, decided August 22, 1949 (regular merchandise manufactured by corporation, inferior merchandise by partnership).

transferred to the partnership, and any finding to the contrary, if made, would be clearly erroneous.

We have here, then, the case of a *bona fide* transfer of a business out of the corporation's hands, with the income in question earned through the individual efforts of the partners and their employees and the credit and property of the partnership. The Tax Court made no ultimate findings of fact to the contrary, and any such finding or findings, if made, would have been clearly erroneous. Instead, the Tax Court applied to the uncontradicted facts an erroneous legal yardstick, the measure of which even its own opinion does not fully disclose. To what course the Tax Court would have been driven had petitioner dissolved in 1941, or what legal standard it believes should have been satisfied, the opinion leaves largely to conjecture.

Concluding our discussion of this topic, the present case is not one in which there was any sham or unreal transaction, or any transitory creation of a fictitious entity. It is not a case in which income earned by one entity has been returned as that of another. It is not a family partnership case. It is simply a case in which a business has been converted from a corporate to a partnership method of operation, with such incidental changes in the rights of the parties as they desired or the law implied. There is no reason why this conversion should not be given the same recognition for tax purposes as has been accorded without question to hundreds of similar conversions that take place every year.

II.

The Tax Court Erred in Failing to Include, When Computing Petitioner's Excess Profits Credit for 1943 and 1944, the Invested Capital and Accumulated Earnings and Profits of the Partnership as of the Beginning of Each of These Taxable Years.

As previously mentioned, the Court will not reach this point unless it holds for the Commissioner on Point I. In that event, however, the Court will then need to consider the method approved by the Tax Court in computing the excess profits credits to which petitioner would be entitled for the years 1943 and 1944. Our position is that the Tax Court compounded its first error by attributing the earnings of the partnership to petitioner but denying it the credits against such income to which it would be entitled if such earnings belonged to it.

A. THE ERROR IN COMPUTING THE CREDITS.

As a consequence of a determination that the partnership's earnings were to be attributed to petitioner, the latter would become liable for the wartime excess profits tax imposed during the years in question by Section 710, Internal Revenue Code. This section imposed a very high tax upon the "adjusted excess-profits net income" of corporations, amounting, in petitioner's case, to about 90% of such income for the years 1943 and 1944.

The scheme of Section 710 and the succeeding sections was to compute the amount of income subject to the excess profits tax by subtracting from the total net income the amount of earnings Congress deemed to be a taxpayer's normal and fair return. This deductible amount, called the excess profits credit, was to be computed in

one of two ways, whichever resulted in the lesser tax. Section 712. The first, not here involved, permitted deduction of an amount equal to the corporation's average net income for the taxable years 1936 to 1939, inclusive. Section 713. The second, employed here, permitted the deduction of an amount equal, so far as this case is concerned, to 8% of the corporation's invested capital for the taxable year. Sections 714-720. *An includible element of the "invested capital" was the accumulated earnings and profits as of the beginning of the taxable year.* Section 718(a)(4).²³

It will therefore be seen that, in imposing this severe tax, the Congress took pains to provide appropriate credits. Manifestly, the burden of this tax is magnified out of proportion to the Congressional scheme if full effect is not given to the credit provisions.

The Tax Court's decision (R. 325-326) established deficiencies against petitioner in the exact amounts asserted by the Commissioner in his deficiency notice of October 3, 1947, excepting only the matter of penalties (R. 12). This means that reference to the deficiency notice will clarify the manner in which the excess profits credits were computed for the purpose of the Tax Court's decision.

The Commissioner proceeded, first, by attributing to petitioner the income of the partnership, in the amounts of \$42,086.52 for 1943 and \$66,002.66 for 1944 (R. 14).

²³The foregoing summary of the excess profits tax provisions accords with the Court's summary in *Commissioner v. South Texas Co.*, 333 U.S. 496, 497.

In *John Breuner Company v. Commissioner*, decided January 25, 1950, this Court has recently considered the inclusion of accumulated earnings and profits in computing invested capital.

These amounts, it will be noted, were not the gross earnings of the partnership but its net earnings, before the "salaries" of the partners but after the salaries and wages of its employees, the cost of goods sold and other appropriate deductions (R. 31, Pet. Exh. 5). The Commissioner then deducted from the amount so transferred to petitioner \$13,200 for each year, representing the salaries of Rogers and Scharpf, as well as, for 1944, a further minor item (R. 14). It will be seen that the resulting amounts of \$28,886.52 for 1943 and \$52,302.35 for 1944 (R. 14) were then carried into the computation of petitioner's excess profits net *income* for each year (1943—R. 15, 17; 1944—R. 18, 19). So far, the computation proceeds logically to follow the Commissioner's theory, as approved by the Tax Court. At the same time, however, in computing the excess profits *credits* this logic is abandoned. For 1943 the excess profits credit was computed with reference only to the par value of petitioner's stock and two minor items derived from petitioner's balance sheet (R. 17). And for 1944 the credit was based solely upon the par value of petitioner's stock (R. 19). The Commissioner, and the Tax Court, entirely disregarded any portion of the partnership's invested capital and accumulated earnings and profits, although it was these, together with the work of the partners and their employees, which had generated the very income upon which the excess profits tax was computed.

Petitioner filed in the Tax Court, prior to the entry of decision, its own computation of the taxes due under the court's opinion (R. 291-307). A reference to this computation further demonstrates the error in the decision as

entered. Petitioner's computation of the credits for the two years is obtained by including, among other items, \$8,000 for each year, representing the initial investment in the partnership, and \$23,356.62 for 1943 and \$52,100.27 for 1944 (R. 302). The two amounts last mentioned are obtained by consolidating the balance sheets of petitioner and the partnership, and including within the invested capital of the consolidated entities the net earnings of the partnership, except the salaries paid to Rogers and Scharpf (R. 301). The amounts represent, respectively, the accumulated earnings and profits at the beginning of each of the taxable years. The respective computations result in a substantial difference in taxes (compare R. 326 with R. 293).

We submit that the Commissioner's computation, as approved and entered by the Tax Court, is oppressively unfair and is wholly without statutory warrant. Section 710 commences by imposing the tax upon the "adjusted excess-profits net income * * * of every corporation," with exceptions immaterial here. The Commissioner's theory in the present case, as approved by the Tax Court, appears to be that petitioner and the partnership are to be treated as a single taxable entity. Therefore, in imposing the tax, the Commissioner and the Tax Court read "every corporation" to mean every "taxable entity." The same logic requires them to give "corporation" and "corporations," as they appear in Section 712(a), relating to the excess profits tax credit, exactly the same meaning.

It would appear that the Commissioner's position has not been consistent on this basic question. *R. O. H. Hill, Inc., supra*, was, as we have seen, a flagrant case where the

partnership was rightfully disregarded. In that case, however, for the purpose of computing the corporation's income, declared value excess profits and excess profits taxes, the Commissioner had refused to allow as deductions additional compensation paid, purportedly by the partnership, to various employees of the corporation whose services had largely contributed to the production of the income. The Commissioner argued that this compensation was not deductible as an expense because the recipients of the payments were not employees of the partnership. The Tax Court answered this argument as follows (9 T.C. at pp. 158-159) :

“We think this argument is inconsistent with respondent's position that the partnership should be disregarded. We have held that the partnership was really the petitioner and that its income was that of the petitioner. It necessarily follows that its disbursements were those of the petitioner and these payments of additional compensation to employees, which are indicated by the record to be reasonable in amount, should be allowed as deductions to petitioner.”

We submit, therefore, that the Tax Court erred in excluding from the computation of the excess profits credit the invested capital and accumulated earnings and profits of the partnership. Other errors in the computation as entered we do not detail. In fact, Commissioner's counsel, although afforded the opportunity, made no detailed analysis or criticism of petitioner's contrary computation (R. 314-324). Decision should have been entered in accordance with petitioner's computation (R. 293).

B. PETITIONER DID NOT WAIVE A CORRECT COMPUTATION OF ITS TAXES.

The Tax Court refused to decide the foregoing questions involved in a correct computation of the deficiencies resulting from its holding that the partnership income was to be attributed to petitioner. Without marshalling the pertinent facts or citing any authority, the single judge did enigmatically comment (R. 326) :

“We are not impressed by the argument that profits credited to the individuals who were petitioner’s stockholders have the character of accumulated earnings of the corporation under a holding denying recognition to the partnership.”

However, the Court immediately proceeded (R. 326) :

“But as no issue was raised in the pleadings as to the computation of taxes under respondent’s determination that the partnership should not be recognized, none may be now raised and decided under Rule 50 [Rules of Practice before the Tax Court of the United States].”

The pertinent procedural facts in this connection are as follows: Following service of the deficiency notice of October 3, 1947 (R. 10-19), petitioner filed its petition in the Tax Court, alleging facts upon which it relied (R. 7-9) and including in its assignment of errors the allegation that the “Commissioner erred in computing excess profits taxes on the net income of petitioner for the years 1943 and 1944 * * * in the amounts set out in Exhibit A [the deficiency notice], or in any other amounts” (R. 6, para. 4(f)). Following a denial of the allegation last mentioned, in the Commissioner’s answer (R. 20, para. 4), the parties at the hearing developed pertinent facts cov-

ering the initial investment in the partnership and its accumulated earnings and profits, Commissioner's counsel cross-examining at length on certain of these matters (*supra*, pp. 13-14; note particularly R. 31, 118-120, 152-155, Pet. Exh. 6).

Thereafter, the court entered its findings of fact and opinion, holding that for tax purposes the partnership was to be disregarded, and concluded its opinion with the statement (R. 284):

“Decision will be entered under Rule 50.”

Following denial of petitioner's motion for review and reconsideration by the full court (R. 4), the parties filed their respective computations of the deficiencies established by the court's holding (Commissioner's computation—R. 286-290; petitioner's computation—R. 291-313). A hearing on the computation was then held by the single judge (R. 314-324). Without independently considering the correct computation of the deficiencies, his decision followed, entering the deficiencies set out in the original deficiency notice, as recomputed by the Commissioner with the elimination of the penalties (R. 12, 287, 326). The reasons given for this extraordinary disposition of the matter were those set out at the beginning of this discussion, *supra*, p. 56.

Clearly, the petitioner was entitled to a hearing on the correct computation of its taxes. This was a right of which neither statute nor rule could deprive it. If the Commissioner now attempts to support the action of the Tax Court, it must be on the ground that in some fashion petitioner waived or abandoned its right to such a computation. Such a waiver or abandonment is certainly not

to be presumed; we submit that the above review of the procedural facts affirmatively shows that there was no such waiver or abandonment.

Rule 50 of the Tax Court's Rules did not put petitioner on notice of any action which it should have taken other than the course followed.²⁴ The gist of Rule 50, for pres-

²⁴“RULE 50.—*Computations by Parties for Entry of Decision*

“Where the Court has promulgated or entered its opinion determining the issues in a proceeding, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the Court's determination of the issues, showing the correct amount of the deficiency or overpayment to be entered as the decision. If the parties are in agreement as to the amount of the deficiency or overpayment to be entered as the decision pursuant to the report of the Court, they or either of them shall file promptly with the Court an original and two copies of a computation showing the amount of the deficiency or overpayment and that there is no disagreement that the figures shown are in accordance with the report of the Court. The Court will then enter its decision. If, however, the parties are not in agreement as to the amount of the deficiency or overpayment to be entered as the decision, in accordance with the report of the Court, either of them may file with the Court a computation of the deficiency or overpayment believed by him to be in accordance with the report of the Court. The clerk will serve a copy thereof upon the opposite party, will place the matter upon a motion calendar for argument in due course, and will serve notice of the argument upon both parties. If the opposite party fails to file objection, accompanied by an alternative computation, at least five days prior to the date of such argument, or any continuance thereof, the Court may enter decision in accordance with the computation already submitted. If in accordance with this Rule computations are submitted by the parties which differ as to the amount to be entered as the decision of the Court, the parties will be afforded an opportunity to be heard in argument thereon on the date fixed, and the Court will determine the correct deficiency or overpayment and enter its decision.

“Any argument under this Rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such report or of any new issues. This Rule is not to be regarded as affording an opportunity for rehearing or reconsideration.”

ent purposes, is that the Tax Court when it enters its opinion "may," in an appropriate case, withhold entry of decision for the purpose of permitting the parties to submit computations showing the correct amount of the deficiency or overpayment resulting from the court's holding. If these computations differ, the parties are afforded an opportunity to be heard in argument thereon before the court. The scope of the hearing on the computation is implicit in the Rule and is expressly stated in its second paragraph. Argument under the Rule is to be strictly confined to the consideration of the "correct computation * * * resulting from the report already made"; such argument is not to deal with issues or matters already disposed of or of any new issues, and does not afford an opportunity for rehearing or reconsideration.

In the present instance, petitioner, of course, did not seek at the hearing on the computation (R. 314-324) a rehearing or reconsideration of matters already disposed of, or the consideration of any matter not directly relating to a correct computation under the court's prior holding.

Nor, we submit, can the Commissioner point to any settled practice or line of decisions which would justify the action of the Tax Court in the present case. This is not a case where petitioner had waived or abandoned any element of a correct computation; the naked question is presented as to the affirmative action which a taxpayer

At the time the petition was filed in the instant proceeding, "a motion" in the fifth sentence of the first paragraph, as quoted above, read "the hearing." Effective December 15, 1948, Rule 50 was amended to its present form. For present purposes this change is immaterial.

must take to secure such a computation. Just a few months before the petition was filed in the instant proceeding, the Tax Court entered a decision involving, as it happened, excess profits taxes under Rule 50, which seems quite inconsistent with its action here. *Hardinge Company, Inc.*, 6 T.C.M. 650, decided June 13, 1947. That case presented the question as to whether, under Rule 50, the court could take into account an overpayment of income taxes which, if sustained, would wipe out a deficiency in excess profits taxes. In its petition to the court the taxpayer had alleged all pertinent facts but had not assigned as error the Commissioner's failure to allow a credit for or refund of the overpayment. The petition apparently did ask for a decision under Rule 50. Holding for the taxpayer and taking the overpayment into account, the court said in part (p. 651):

“The point upon which the fact of overpayment depends is not the claim therefor in a petition timely filed but the facts set forth in such petition which if proved establish overpayment * * *. Petitioner did not state specifically in its petition that it claimed an overpayment but it asked for decision under Rule 50. That means that petitioner claimed whatever a computation in accordance with the established facts of the case showed it entitled to receive.”

The petition in the present case is more explicit than apparently was the petition in the *Hardinge* case. The instant petition did not mention Rule 50, but the Tax Court itself invoked this rule in its opinion entered March 23, 1949 (R. 284). This was the obviously correct action on the part of the court, but it also tended to assure peti-

tioner that the deficiencies asserted against it would receive a full and fair review and that no immediate action by petitioner in the form of a motion to reopen the prior hearing or to amend its petition was necessary in order to obtain such a review.

We submit, therefore, that petitioner remains entitled, under the Tax Court's holding attributing the income of the partnership to petitioner, to a correct computation of the deficiencies in its taxes.

III.

The Scope of Review in Tax Court Cases.

By virtue of the 1948 amendment to Section 1141(a) of the Internal Revenue Code,²⁵ Tax Court decisions are now to be reviewed "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." This means that all issues of law are open for review and that, under Rule 52(a), Federal Rules of Civil Procedure, findings of fact are to be reviewed by application of the "clearly erroneous" test. See *Grace Bros. v. Commissioner*, 173 F.2d 170, 173-174 (9th Cir.). The review under the "clearly erroneous" test is to be contrasted with the narrower scope of review under the "substantial evidence" test, which is applicable to jury verdicts and the findings of certain administrative agencies (*Labor Board v. Columbian Co.*, 306 U.S. 292, 300). Contrasting the "clearly erroneous" test with the latter test, the Supreme Court has observed that in the

²⁵Section 1141(a), Internal Revenue Code, 53 Stat. 164, as amended by Section 36 of the Act of June 25, 1948, 26 U.S.C., Supp. II, Sec. 1141(a).

latter case, "the review is much more restricted." *District of Columbia v. Pace*, 320 U.S. 698, 702.²⁶

"A finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Italics ours). *United States v. United States Gypsum Co.*, 333 U.S. 364, 395.

The present is not a "fact" case, and we include this brief reference to the scope of review primarily for completeness of our discussion. Here, the Tax Court rather clearly demarked its findings of fact from its application of what it conceived to be the law to the facts. The critical error of the Tax Court is to be found in its application to the uncontradicted facts of an erroneous concept of the law, which included, as we have seen, giving weight to the internal organization of the partnership. Accordingly, this Court's review is essentially a re-examination of the applicable law, unencumbered even by the clearly erroneous test.

²⁶See Stern, "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis," 58 Harv. L. Rev. 70, 80-89. At the cited pages, this article contrasts the "clearly erroneous" and the "substantial evidence" rules.

CONCLUSION

For the reasons discussed under Point I of the Argument, the decision of the Tax Court should be reversed. Should the Court find it necessary to consider Point II of the Argument, then, for the reasons therein discussed, the case should be remanded to the Tax Court for a correct computation of the tax deficiencies.

Respectfully submitted,

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February 3, 1950.

No. 12386

**In the United States Court of Appeals
for the Ninth Circuit**

TWIN OAKS COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

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In the United States Court of Appeals for the Ninth Circuit

No. 12386

TWIN OAKS COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 277-284 is not officially reported.

JURISDICTION

This petition for review (R. 327-331) involves federal income, declared value excess profits and excess profits taxes for the taxable years 1942, 1943 and 1944. On October 3, 1947, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of \$55,638.42. (R. 10-11.) Within ninety days thereafter and on December 24, 1947, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code. (R. 2, 5-19.)

The decision of the Tax Court was entered on July 18, 1949. (R. 325-326.) The case is brought to this Court by a petition for review filed September 16, 1949 (R. 327-331), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether the Tax Court correctly held that the income for the years 1942, 1943 and 1944 of an alleged partnership, Twin Oaks Builders Supply Company, could be properly attributed to the taxpayer corporation under Section 22 (a) of the Internal Revenue Code.

STATUTE INVOLVED

This is set forth in the Appendix, *infra*.

STATEMENT

The Tax Court found the following facts (R. 268-277) :

Taxpayer, an Oregon corporation with principal office at Eugene, Oregon, filed its income and declared value excess-profits tax returns for the years 1942, 1943 and 1944 with the Collector of Internal Revenue for the district of Oregon. It was organized in 1924 and engaged in the sale of lumber and builders supplies at Eugene and Junction City, Oregon, and until 1937 at Cottage Grove, Oregon. In 1941 it had outstanding 946 shares of stock of a par value of \$94,600, or \$100 each. Half of these shares were owned by John J. Rogers, taxpayer's president, and the other half were owned by Louis C. Scharpf, taxpayer's secretary-treasurer, and his wife, Eva M.

Scharpf, in the amounts of 35.3 and 437.7 shares, respectively. Two of the Scharpf shares were held in the name of E. R. Bryson, an attorney, to qualify him as a director with Rogers and Scharpf. Eva M. Scharpf purchased her shares at various times with funds inherited from her father. She and Rogers had acquired most of their shares before 1930. (R. 268.)

During the years 1935-1940 taxpayer's books showed assets which were carried at total values ranging from \$117,283.26 in 1938 to \$150,431.66 in 1940. These assets consisted chiefly of merchandise inventory and accounts receivable and in addition there were buildings, furniture and fixtures which had a book value of about \$37,000. During 1935-1940 taxpayer sustained small operating losses, but receipts from other sources produced net incomes of a little over \$2,000 for 1936, 1937 and 1939, \$677.05 for 1935, and \$6,036.35 for 1940. As officers, Rogers and Scharpf received equal salaries which, combined, ranged from \$9,800 in 1937 to \$14,400 in 1940. Both were actively engaged in the conduct of taxpayer's business; Rogers purchased stocks of lumber, shingles, molding and coal and had charge of credit and collections; Scharpf made purchases of all other building materials handled. Their wives rendered no services. (R. 268-269.)

In the latter part of 1939 Scharpf suggested to Rogers that the business be conducted as a partnership. Rogers was not agreeable to the change, being reluctant to assume the unlimited liability of a partner. Scharpf persisted, however, and during 1940

both had a number of conferences with Bryson, the attorney, who had given them advice for many years. The attorney recommended acceptance of a plan to which Rogers finally assented, and pursuant thereto Rogers, Scharpf and their wives made a partnership agreement as of January 1, 1941, whereby the four were to conduct the business as equal partners with operating assets which taxpayer was to transfer to them and on premises which taxpayer was to retain and rent to them. (R. 269.)

At the close of 1940 taxpayer's balance sheet showed the following assets and liabilities (R. 269-270):

ASSETS		
Cash		\$243. 96
Notes and accounts receivable.....		37, 477. 76
Merchandise.....		70, 892. 48
Investments		2, 926. 09
Land.....		23, 993. 25
Buildings.....	\$26, 276. 49	
Furniture	6, 959. 28	
Trucks.....	5, 239. 49	
		<hr/>
		38, 475. 26
Less: Depreciation.....		23, 653. 78
		<hr/>
	14, 821. 48	14, 821. 48
Paid insurance.....		176. 64
		<hr/>
Total		150, 531. 66
LIABILITIES		
Accounts payable.....		16, 271. 55
Notes payable.....		34, 238. 00
Accrued taxes.....		3, 001. 89
Earned surplus.....		2, 420. 22
Capital stock.....		94, 600. 00
		<hr/>
Total		150, 531. 66

The accounts or notes payable comprised \$2,144 due Rogers, of which \$1,200 was salary and \$944 dividends; \$1,270.60 due Scharpf, of which \$1,200 was

salary and \$70.60 dividends; a note for \$1,500 due Corabelle M. Rogers, and a dividend of \$873.40 due Eva M. Scharpf. Taxpayer's land and buildings consisted of town lots at Eugene, improved with a concrete building and hydraulic elevator, a large frame building, a storage shed and spur railway track; two lots at Junction City improved with a hollow tile warehouse and a wooden shed, and an old warehouse and vacant lots at Cottage Grove. The State Highway Commission had drafted plans to run a new highway across the principal property at Eugene, but later changed the highway routing. Taxpayer also occupied leased premises. About nine-tenths of its sales were made at Eugene; one-tenth at Junction City, and the Cottage Grove property was sometimes rented, but produced little income. (R. 270-271.)

Pursuant to the plan agreed upon for the formation of a partnership taxpayer's directors on January 2, 1941, resolved to change taxpayer's name from Twin Oaks Builders Supply Company to Twin Oaks Company and to accept the offer of Rogers, Scharpf and their wives to acquire its current assets at book values in consideration of their assumption of its accounts payable and their two per cent note for the balance; to lease to them its fixed assets, and to discontinue its builders supply business. On January 25, but as of January 1, 1941, Rogers, Scharpf and their wives each signed a partnership agreement, declaring their intention to associate themselves together as copartners under the firm name of Twin Oaks Builders Supply Company for purchasing from taxpayer, which then

had the same name, all its assets except real estate, fixtures and equipment and for leasing the latter. It was agreed that each contribute \$2,000 and share equally in profits and losses; that the partnership engage in the same business as that previously conducted by taxpayer; that such business be conducted by Rogers and Scharpf, each performing "the work heretofore by him performed" and each being entitled to a salary in addition to his share of the profits; that a bank account be opened in the partnership's name against which checks could be drawn by Rogers or Scharpf or by "some person to whom they may jointly in writing delegate such power." (R. 271-272.)

Each of the partners shall have an equal voice in the control of the business and the affairs of the copartnership and in the decision of any question which may arise. (R. 272.)

The duration of the agreement was not limited in time, but either pair of spouses desiring dissolution was required to notify the other pair and offer to purchase the others' interest not only in the partnership but also in taxpayer's stock, and to assume the indebtedness of both firms. On acceptance of the offer the sellers were to agree not to engage in the same business in the area for four years. If the offer should not be accepted within 90 days, the offering spouses could require a termination and liquidation of the partnership. For the purposes of these provisions each pair of spouses "shall be deemed as one copartner." Upon the death of a wife the surviving husband was bound to purchase her interest in

the partnership and the corporation for a price determinable by reference to book value. Upon the death of a husband the surviving husband and his spouse had a 90-day option to purchase the interests of both the others on like terms. These terms provided for installment payments with security and the arbitration of disputes. By a contract of May 31, 1938, Rogers, as party of the first part and owner of one-half of taxpayer's shares, and Scharpf and wife, as parties of the second part and owners of the other half, had agreed that upon the death of either husband, the survivor should have the right to acquire the other party's stock in taxpayer on like terms. By a "Supplement to Partnership Agreement," signed January 30, 1941, it was recited that Corabelle M. Rogers and Eva M. Scharpf "render and are expected to continue to render some personal services to the partnership" and it was agreed that each "be paid a salary of \$25.00 per month," regardless of profits and losses for the services which were to be performed "at their convenience." (R. 272-273.)

On January 2, 1941, Rogers, Scharpf and their wives signed a certificate of their intention to conduct a lumber and building supplies business at Eugene and Junction City, Oregon, under the assumed name of Twin Oaks Builders Supply Company, and filed it in the public records of Lane County, Oregon, on January 18. The partnership, by Rogers, gave to taxpayer its note, dated January 2, 1941, in the amount of \$89,378.35 payable in one year with two per cent interest. This amount represented the ex-

cess of the book value of current assets covered by the purchase offer above the accounts payable which the partnership was to assume. As of January 1, 1941, entries were made in taxpayer's books indicating the transfer of its cash, notes and accounts receivable, merchandise, investments of \$2,726.09, and delivery equipment of \$1,809.61 to the partnership, and the elimination of \$16,271.55 and \$7,500 of accounts and notes payable, respectively, from its liabilities. (R. 273-274.)

As of the same date books were opened in the name of the partnership, indicating as its assets the cash, notes and accounts receivable, the merchandise, investments and delivery equipment in the same amounts transferred from taxpayer's books and also on account receivable of \$500 from Rogers. Liabilities were shown as accounts payable of \$16,271.55, notes payable of \$89,378.35, and "partners' investment accounts" of \$8,000. The \$8,000, representing the \$2,000 contribution of each partner required by the agreement, was provided largely by the cancellation of amounts owed to them or to members of their families by taxpayer on account of unpaid salary, dividends and monies advanced. (R. 274.)

By a written agreement dated January 2, 1941, taxpayer leased to the partnership all its remaining assets, consisting of the real properties, fixtures and equipment, for \$3,000 a year. The partnership on the same date filed with the State Industrial Accident Commission a "notice of engaging in hazardous occupation" and of employing 25 workmen on an estimated monthly payroll of \$2,600. It registered with the State

Unemployment Compensation Commission and filed required reports thereafter. It applied for and received a registration number under the Social Security Act. It advised the First National Bank of Eugene about taxpayer's transfer of assets to it, and opened an account with the bank from which each of the four partners was authorized to withdraw funds. It served formal notice on the bank in December 1944 that each of them had power to act for the firm in borrowing money, making and endorsing notes and in transferring assets. (R. 274-275.)

After January 1941 the lumber and builders supply business was conducted by Rogers and Scharpf as before; the partnership bore the same name that taxpayer had formerly borne; made contracts and transacted business in that name, and taxes were assessed against it in that name. (R. 275.)

There were no changes obvious to customers except the elimination of officers' names on stationery. The wives of Rogers and Scharpf, who had rendered no services before, sometimes signed pay roll checks and notes and listed accounts receivable once a month. Separate bank accounts and separate books were maintained for taxpayer corporation and for the partnership. Taxpayer's activities, as recorded, were limited to the owning and leasing of real estate and equipment. Its income for the years 1941-1944 consisted of the \$3,000 rent and interest on the note of the partnership and some very petty miscellaneous items. Its books indicated a loss of \$904 in 1941 and net incomes of a few hundred dollars for the succeeding years. In July 1941 it bought a lot and old frame

residence adjoining its property in Eugene for between \$3,500 and \$4,000 and demolished the building. The lot has since been used in the builders supply business for storage. In December 1943 it bought another lot and residence in Eugene for \$2,500. The property was then rented for \$66 a month; the tenant remained in possession and thereafter paid the rent to the partnership. In 1946 and 1947 the partnership paid \$4,200 to taxpayer as rent. (R. 275-276.) The books of the partnership indicate the following gross and net incomes for the years indicated (R. 276):

Year	Gross Income	Net income
1941-----	\$375, 587. 51	\$29, 776. 20
1942-----	262, 931. 20	18, 525. 29
1943-----	356, 930. 54	42, 086. 52
1944-----	512, 001. 16	66, 119. 33

The net income was each year credited on the partners' accounts, \$6,600 being credited to each husband as salary; \$300 to each wife as such and the remainder divided among them in equal parts. The partnership paid taxpayer the \$89,378.35 due on the note plus two percent interest thereon in annual installments ending in December 1946, using earnings and the proceeds of property sales. The partnership has endorsed taxpayer's notes for bank loans. (R. 276.)

For the years 1941-1944 corporation income and declared value excess-profits tax returns were filed for taxpayer and separate partnership returns for the partnership. Taxpayer filed no excess profits tax returns for 1943 and 1944. The Commissioner determined deficiencies in taxpayer's income and declared

value excess-profits taxes for 1942, 1943 and 1944, and in excess profits taxes for 1943 and 1944 by including in taxpayer's income the profits reported by the partnership, with certain adjustments, under the view that the partnership, transfers of assets and leases to it were without substance and should be disregarded for federal tax purposes. For the same reason taxpayer's reported operating loss of 1941 was not allowed as a carry-over for 1942. (R. 276-277.)

The Tax Court held that the Commissioner was correct in refusing to recognize the partnership for tax purposes. (R. 277-284.)

SUMMARY OF ARGUMENT

Involved in the instant case is a split-up of an existing, unitary business into two parts—the taxpayer corporation and the purported partnership. We submit that the income of the split-off enterprise—the partnership—should be taxed to the corporation.

The business was conducted in precisely the same way after the transfer as it was before. This was not a division of a business into logical units which are separable, such as the selling and distributing end of a business being divided from the manufacturing end, or the separation of commission activities from trading activities. No substantial business purpose was served by the severance. No new capital was contributed or new services rendered after the separation. The inter-company dealings were not arms' length transactions. The transaction was, in effect, an assignment of income, and the purported partnership should be ignored for purposes of the federal income tax.

Also, since no issue was raised in the pleadings relative to the inclusions of the accumulated earnings and profits of the alleged partnership in the invested capital of the taxpayer, it was too late to suggest it first during the computation under Rule 50.

ARGUMENT

I

The Tax Court correctly sustained the Commissioner's determination that the income of the alleged partnership, Twin Oaks Builders Supply Company, was in substance the income of the taxpayer under section 22 (a) of the Internal Revenue Code.

The question here is substance versus form, and the law is familiar. *Helvering v. Clifford*, 309 U. S. 331; *Gregory v. Helvering*, 293 U. S. 465; *Commissioner v. Culbertson*, 337 U. S. 733. This is merely another one of the situations in which, in the circumstances, the conclusion is inescapable that the taxpayer earned the income diverted to the partnership and should be taxed thereon. See *Lucas v. Earl*, 281 U. S. 111; *Helvering v. Horst*, 311 U. S. 112.

It should be emphasized initially that *Commissioner v. Culbertson*, *supra*, is not contrary to the Commissioner's position.¹ Prior to that decision, seizing upon

¹ It should be noted that this is not a family partnership case, as such. But the general principles enunciated in the *Culbertson* case, *supra*, are applicable. Similarly applicable are the principles enumerated in other situations where mere form has been ignored. *Gregory v. Helvering*, 293 U. S. 465 (corporate existence ignored for income tax purposes); cases arising under Section 45 of the Internal Revenue Code—see *Cooper*, Section 45, 4 Tax L. Rev. 131 (1949); *Helvering v. Clifford*, 309 U. S. 331; and cases arising under Section 3797 of the Internal Revenue Code—see *Morrissey v. Commissioner*, 296 U. S. 344, and *Lewis & Co. v. Commissioner*, 301 U. S. 385.

an approach stemming from a selective culling of *Commissioner v. Tower*, 327 U. S. 280, and *Lusthaus v. Commissioner*, 327 U. S. 293, an objective standard was laid down which family partnerships had to meet in order to receive recognition for tax purposes. The *Culbertson* case, *supra*, merely holds that the emphasis must not be on the setting down of an itemized objective standard, but rather on the real intent of the partners gained from all the circumstances.

The Tax Court, in its opinion (R. 283), indicates that it is not holding anything interdicted by the later *Culbertson* opinion:

This testimony, in our opinion, affirmatively supports the respondent's view that *the purpose of the partnership was to achieve a re-allocation of income among family groups.* [Emphasis supplied.]

Specifically this case comes in the general area of business split-ups. The most common type of split-up occurs when a corporation transfers some branch of its business operations to a partnership composed of its stockholders or to a single proprietorship represented by its sole stockholder.

Since most of these split-ups follow this conventional pattern, it is futile to analyze the cases separately as if each case were unique or *sui generis*. The important thing is to see what factual variants cause different results and to discover the judicial criteria which have been erected for either sustaining or condemning the validity of such a business split-up.

In the instant case it is clear that the partnership presented a device for paying corporate profits to its

shareholders without first funneling them through the corporation. In such a situation, the tax falls upon the corporation and the entity of the partnership must be ignored. *Gregory v. Helvering, supra*; *Minnesota Tea Co. v. Helvering*, 302 U. S. 609. *Griffiths v. Helvering*, 308 U. S. 355. *Higgins v. Smith*, 308 U. S. 473. As the Tax Court pointed out (R. 280-282) :

But we do not perceive substance in these forms. After as before January 1941 the business was conducted by Rogers and Scharpf under the same name with the same assets in the same manner. No additional funds were paid in as operating capital; no assets were removed; and there was no change in policy or in managing personnel apart from the negligible services of the wives * * *. But as the note itself was paid off by earnings of the business, it seems plain that the capital contributions to the partnership and the sale price of the assets were both satisfied by bookkeeping entries conforming to a scheme which had no substantive effect whatever on the business. And since petitioner's officers continued as business managers, it can be said here as in *R. O. H. Hills, Inc.*, 9 T. C. 153, that:

"* * * the partnership contributed absolutely nothing either in services or capital to the production of the income * * *. * * * its function and purpose were merely to siphon off the greater portion of the earnings * * *."

Cf. *Ingle Coal Corporation*, 10 T. C. 1199; *Forcum-James Co.*, 7 T. C. 1195.

The Tax Court's findings in this respect are not only not "clearly erroneous" (*United States v. Gypsum Co.*, 333 U. S. 364, 395) but are abundantly supported by the record.

In the first place, there was no business carried on by the partnership which was different from that carried on by the corporation. In addition, this is not the case of a logical, natural division of a corporate business into a separable unit. Taxpayer's business was unitary in character. There has not been at any time—before or after January 1, 1941—any departments or functional operating divisions of taxpayer. The real properties of the taxpayer were essential to the conduct of the business. Again, as the Tax Court concluded (R. 282):

Petitioner's business, it should be noted further, was unitary in character and in this respect differed from the businesses considered in *Miles-Conley Co., Inc.*, 10 T. C. 754; *Buffalo Meter Co.*, 10 T. C. 83, and *Seminole Flavor Co.*, 4 T. C. 1215.

See also, *Advance Machinery Exchange, Inc. v. Commissioner*, decided January 25, 1949 (1949 P-H T. C. Memorandum Decisions Service, par. 49,026).

Further, this was not an arms' length transaction, and such inter-company dealings marked by a lack of fair consideration between the parties have been relevant in a consideration of the reality of a partnership. See *R. O. Hill, Inc. v. Commissioner*, 9 T. C. 153, 157. Here, the \$89,378.35 unsecured promissory note, representing the major portion of the purchase price bore interest at the rate of two per cent. (R.

273.) The taxpayer's own witness testified that the then prevailing local interest rate for commercial loans was six percent. (R. 191.)

Also relevant in this connection is the fact that the fixed annual rental to be paid by the partnership for the use and occupancy of the taxpayer's properties, furniture and fixtures was \$3,000 a year. (R. 274.) Yet the fair rental value of the real properties, furniture and fixtures in question was about \$7,000 a year. (R. 209, 238.)

Similarly important in considering the correctness of the conclusion of the Tax Court is the fact that the banks in continuing the line of commercial credit subsequent to January 1, 1941, relied upon its faith and confidence in the set-up, as represented by both the taxpayer corporation and the purported partnership. (See R. 189-191.) In other words, the business was considered the same by outsiders dealing with the firm.

Further supporting the Commissioner's position that this was a mere formal arrangement for siphoning profits from the taxpayer—an assignment of income—is the basis for the Tax Court's conclusion (R. 283) that the purpose of the formation of the alleged partnership was "to achieve a reallocation of income among family groups." The facts forming the foundation for this conclusion were summarized by the Tax Court as follows (R. 283):

Attorney Bryson testified that Scharpf felt entitled to a more substantial interest in the business than that represented by his 35.3 shares and wished the partnership as a means

of getting that interest while Rogers opposed, fearing the unlimited liability and the possibility that Scharpf would want to take in his sons. Scharpf himself said that he wanted a partnership "so that I would have a decent share of the profit"; also that under such a form of organization he could get out more readily. He expected Rogers to have a half interest, but Rogers decided to take his wife in also because, in his own words, "although I was the only member of the corporation, still it was a family affair."

Another factor to be considered is the existence of a business purpose. In *Seminole Flavor Co. v. Commissioner*, 4 T. C. 1215, it was shown that the facilities and organization of the corporation were so inadequate that it was unable to give its bottlers the advertising, merchandising and supervisory services called for in their franchise agreements. The transfer of these functions to the partnership, it was urged, afforded the most feasible and flexible arrangement for overcoming the merchandising and marketing difficulties of the corporation. In *Miles-Conley Co. v. Commissioner*, 10 T. C. 754, the split-up was justified on the ground that it was the common and accepted practice for the larger produce commission firms to specialize in either fruits or vegetables, or even in certain types of fruits and vegetables. In *Standard Fruit Product Co. v. Commissioner*, decided August 22, 1949 (1949 P-H T. C. Memorandum Decisions Service, par. 49, 207), the partnership was formed to handle "substitutes" under a different

brand name so as not to injure the good will and reputation which the corporation had built up.

In the case at bar, no such business purpose was served. As indicated, *supra*, there was no change in the business—lumber and builders supplies were sold both before and after January 1, 1941. No capital was added to the business. There was no change in the management.

The cases cited by taxpayer (Br. 37-39) are clearly distinguishable. The significant fact of *Ross v. Commissioner*, 129 F. 2d 310 (C. A. 5th), is not present. There the corporation and the partnership (comprised of its stockholders) were formed at approximately the same time and no part of the business of the corporation was relinquished to the stockholders. In *Epsen Lithographers, Inc. v. O'Malley*, 67 F. Supp. 181 (Nebr.), there was a business purpose, i. e., to retain the services of the younger sons, and, the amount fixed as rental to be paid by the partnership to the corporation was fair and reasonable. The other cases, *Seminole Flavor Co. v. Commissioner*, *supra*, *Buffalo Meter Co. v. Commissioner*, 10 T. C. 83, and *Miles Conley Co. v. Commissioner*, *supra*, have already been shown to be inapplicable here since they involved businesses subject to a logical division.

The fact of keeping separate books cannot save this partnership. Many factors are to be weighed in a determination of whether an alleged entity is a fiction. The lack of an apparent business purpose, the fact that the purchase agreement and the rental agreement were not arms' length transactions, and the unitary nature of the business of taxpayer are all factors

compelling the conclusion that, in effect, this was not an actual business split-up, but merely an assignment of income. The income of the alleged partnership is in reality that of the taxpayer.

II

The Tax Court properly refused to consider the question relative to the inclusion of the accumulated earnings and profits of the alleged partnership in the invested capital of the taxpayer

No issue was raised in the pleadings relative to the proper computation of the invested capital of taxpayer. This was first suggested during the computation under Rule 50. On this point, the Tax Court stated (Br. 326):

But as no issue was raised in the pleadings as to the computation of taxes under respondent's determination that the partnership should not be recognized, none may be now raised and decided under Rule 50.

Taxpayer argues (Br. 51-61) that the Tax Court erred in taking this position. However, it is well settled that new issues, i. e., one not involved in the original proceedings, will not be considered and decided under Rule 50. The taxpayer has had his day in court and the proceedings under Rule 50 are exclusively for purposes of computation. As was pointed out by this Court in *Fifth Street Bldg. v. Commissioner*, 77 F. 2d 605, 609, in a case involving a determination as to whether a sum paid to acquire a lease was includible in invested capital—

The Commissioner moved to disallow depreciation on the lease during the period from Janu-

ary 2, 1921, to May 18, 1921, and petitioner moved to exclude the rentals for that period from its taxable income and include that amount in its invested capital for 1921. Since this was a new issue, and as "New issues, other than those relating to computations, cannot be raised upon computation of the tax under Rule 50" [*Davison v. Commissioner* (C. C. A. 2) 60 F. (2d) 50, 52], the Board properly denied the motions. See, also, *Bankers' Coal Co. v. Burnet*, 287 U. S. 308, 53 S. Ct. 150, 77 L. Ed. 325.

See also, *Commissioner v. Fifth Avenue Bank*, 84 F. 2d 878 (C. A. 3d).

CONCLUSION

Accordingly, the decision of the Tax Court should be affirmed.

Respectfully submitted.

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MAY 1950.

APPENDIX

Internal Revenue Code:

SEC. 22 [As amended by Sections 1 and 3, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574].

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly. In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income.

* * * * *

(26 U. S. C. 1946 ed., Sec. 22.)



No. 12,386

IN THE
United States
Court of Appeals
For the Ninth Circuit

TWIN OAKS COMPANY,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Reply Brief for Petitioner

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IN THE
**United States
Court of Appeals**
For the Ninth Circuit

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Reply Brief for Petitioner

The Commissioner's brief (herein cited "Com. Br.") makes no attempt to deal with the analysis of the case set out in petitioner's main brief (herein cited "Br.") and, so far as appears, was written without regard to the development of our argument.

Accordingly, we now limit ourselves to comment upon certain of the arguments advanced in the Commissioner's brief. Point I, below, is concerned with the fundamental question of whether the earnings of the partnership can be taxed to petitioner corporation, and Point II with the procedural question under the Tax Court's Rule 50.

I.

The validity of the partnership under State law. Counsel for the Commissioner repeatedly refer to the "alleged" or "purported" partnership (Com. Br. pp. (I), 2, 11, 12, 18, 19). This is an unfair and misleading characterization of the partnership here involved. The evidence is crystal clear that under State law a legally recognized partnership existed, with the assumption of unlimited personal liability by the partners and all other incidents of the partnership relation; and that the business after January 1, 1941 was conducted by this partnership (Br. pp. 10-17). Of course, the Tax Court made no finding to the contrary.

"State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." *Morgan v. Commissioner*, 309 U.S. 78, 80; *Heiner v. Mellon*, 304 U.S. 271, 279. The Commissioner argues that the present partnership is a "fiction", "a mere formal arrangement for siphoning profits from the taxpayer" (Com. Br. pp. 16, 18). But the obvious starting point for an inquiry into such charges is the governing business law. See *Commissioner v. Culbertson*, 337 U.S. 733, 744-745. And where, as here, no mere transitory or anticipatory arrangement is involved—that is, where there is no fraud or sham, but a distinct commercial entity comes into existence and conducts the business in question throughout the years—a reference to the State law both begins and ends the inquiry. See *E. R. Goold v. Commissioner*, decided by this Court May 4, 1950, and cases cited from this and other Courts (Br. pp. 27-33).

The argument that the business conducted by petitioner prior to 1941 and thereafter by the partnership was "unitary in character". Counsel attempt to erect as a major

proposition the argument that the business here in question was "unitary in character" (Com. Br. pp. 11, 13-15).¹ The argument assumes the existence of a rule of law that a business labeled "unitary" must invariably be operated in a manner to yield the maximum taxes, and, taxwise, can never be transferred or subdivided. The minor premise is that the lumber and building supply business here involved is such a "unitary" business and was impermissibly transferred or subdivided.

First, there is no such rule of law. The only pertinent rule of law is that which distinguishes between a transaction which is genuine and one which is a mere fraud or sham. An obvious case where there was no genuine division of a business is *R. O. H. Hill, Inc.*, 9 T. C. 153 (Br. p. 41). On the other hand, if two or more entities genuinely conduct their affairs separately, then it is immaterial whether the separate businesses were formerly conducted as a unified whole.²

1. It may be noted that the single judge of the Tax Court placed no such emphasis upon the unitary-in-character argument, relegating it simply to an attempted means of distinguishing the instant case from various other cases decided by the Tax Court in favor of the taxpayer (R. 282).

2. The Commissioner's brief usefully cites (p. 12, fn. 1) Cooper, "Section 45," 4 Tax L. Rev. 131 (1949), but there should be no implication that this article supports the Commissioner's position, for on the contrary it confirms our own position with respect to business "split-ups" and other aspects of the case. At pages 144-149 the author reviews the cases cited in our main brief (pp. 38-43). The author's ultimate conclusion (p. 167) is that:

"The Commissioner *may not* merge, consolidate or shift into one taxpayer the income of another business which is in fact separately conducted, even though the businesses constitute related functions of an overall enterprise and might have been, or at one time were, conducted as a single business. He may do so only if analysis reveals that one or more of the allegedly separate businesses were not in fact separate or had no real substance."

Second, the instant case is not an example of the splitting up of a "unitary" business. Prior to January 1941 petitioner operated a lumber and building supply business. On January 1, 1941, the partnership took over the operation of this business. No question of a split-up arises. It is true that petitioner continued to own the real estate and thereafter leased it to the partnership. However, the renting of real estate was obviously not the business previously engaged in by petitioner; and nothing is more common in the commercial field than for a going business, like the partnership, to lease the premises which it occupies. In fact, the record discloses that the partnership's neighbor in Eugene, the Long-Bell Lumber Company, likewise leases the real estate on which it does business (R. 55).

In *Ames Theatre Co.*, 5 T.C.M. 44, a corporation, which owned theatre buildings and operated them prior to the taxable year in issue, leased the buildings to a partnership formed by its stockholders. In *Fair Price Stations, Inc.*, 5 T.C.M. 401 (Br. p. 49, fn. 22) a corporation leased its gasoline stations to a partnership formed by its stockholders. In each case the Commissioner attempted to tax the partnership's income to the corporation, and in each the Tax Court held for the corporation, recognizing the separate existence of the partnership.³ We have heretofore cited numerous cases, holding for the taxpayer corporation, where the businesses involved were entangled to an extent wholly lacking in the present case (Br. pp. 37-40, 49, fn. 22).⁴

3. After referring to these cases Cooper concludes, 4 Tax L. Rev. 131, 149: " * * * the operation of property may be separable from its ownership."

4. In addition to certain of the cases previously cited and discussed in our main brief (pp. 38-42, 49, fn. 22) the Commis-

The Commissioner's reliance on non-existent findings of fact. Counsel attempt to buttress the decision below with the argument that certain dealings between petitioner and the partnership were not at arm's length. In support of this, their brief points to the fact that the partnership's note, given to petitioner in part payment of certain of its assets, drew interest at 2%, and cites the testimony that the prevailing interest rate for *commercial* loans was 6%. It is also contended that the rental established in the lease of petitioner's real estate to the partnership was inadequate because it was fixed at \$3000 a year whereas the fair rental value was "about \$7000" a year (Com. Br. pp. 15-16).

With respect to the interest rate, counsel ignore the undisputed testimony of the vice president of the First National Bank of Eugene that "contracts of this nature are usually at a lower rate than the going bank interest rates" and that "I don't know of any" standard rate for such a contract (R. 186-187; Br. pp. 14-15, fn. 5). The Tax Court made no finding or comment concerning the interest rate; any finding that the interest rate was inadequate would have been clearly erroneous.

sioner cites only *Advance Machinery Exchange, Inc.*, 8 T.C.M. 84 (Com. Br. p. 15). The brief makes no attempt to assimilate the facts of that case to the present case. On every significant point the facts there were wholly different. In the *Advance* case there were in form four separate entities, but all were

"* * * engaged in the same business, at the same location, using the same equipment, with the same employees, and to a large extent supplying the same customers. All four businesses were controlled by J. Blachman and Seymour Blachman, father and son. The two operated the business and kept the books and records of all four businesses in such a way that the net profit of each could be manipulated as they saw fit, and, in general, so conducted the business that it is impossible to determine where the activities of one or the other begin and end." 8 T.C.M. 84, 89.

As to the rental rate, there is some dispute but the preponderance of the testimony supports the \$3,000 annual rate fixed in the lease. Here, also, the Tax Court made no finding or comment to the effect that the rental rate was inadequate, or otherwise on this subject (Br. pp. 14-15, fn. 5). Any finding that the rental was inadequate, if made, would have been essentially an attempt to substitute the judgment of the Tax Court in 1949 for that of the parties to the transaction in 1941. For another reason, moreover, even an adverse finding on this point would not be sufficient to support the decision below. The undisputed fact is that a lease was made, and that a substantial rental was paid. The adequacy of the rental as such is not in issue. The Commissioner's position is much broader—namely, that the alleged inadequacy of the rental set in the lease, together with numerous other elements, establish that the partnership and its operation were a fraud or sham. But the other elements in the case prove exactly the contrary and establish that the partnership genuinely existed and produced the income in question.⁵

5. The recent case of *E. R. Goold v. Commissioner*, decided by this Court May 4, 1950, confirms the foregoing analysis. The Court pointed out in that case that "the tax incidents of the transfer itself" were not in issue.

Also pertinent is the following extract from the *E. R. Goold* opinion.

"Under existing law, the father had complete freedom, at least up to the date of this writing, to transfer his property in any way he saw fit. So far as the disputed income tax deficiencies are concerned, whether or not the sale was an improvident transaction, is not of the business of the tax collector. The tax collector's apparent opinion that the father should not have sold valuable property to his son without a cash consideration, or that he should not have taken in payment a note payable out of future profits, is utterly immaterial."

The point, in any event, is that the evidence on this subject, viewed most favorably from the standpoint of the Commissioner, is at best disputed, *and that the Tax Court made no findings whatsoever on the point.* Therefore, the elementary rule is applicable that, on review of Tax Court decisions, the Court of Appeals may not make its own findings of fact but must reverse if the Tax Court findings are inadequate to support its decision.⁶

The Commissioner's treatment of other evidence. Equally untenable is the Commissioner's treatment of the fact that the partnership endorsed one or more of the petitioner's renewal notes representing loans made to petitioner by the First National Bank of Eugene prior to the transfer of the business to the partnership (Com. Br. p. 16; cf. Br. pp. 16-17, fn. 7). There is no significance whatsoever in this fact. The loan was made to petitioner, not the partnership, and the proceeds had gone solely to petitioner. The loan having been made when petitioner operated the lumber and building supply business, it was quite natural that upon a renewal note given after the transfer of the business, the Bank should seek to obtain the partnership as an endorser. As the vice president of the Bank testified, with commendable candor, " * * * I think we always try to get all the signatures we can" (R. 183).

From the foregoing, the Commissioner also argues that the Bank and the public generally regarded the partnership and petitioner as a single business entity (Com. Br. p. 16).

6. " * * * we have no power to make findings and can but reverse if the findings are inadequate." *Commissioner v. Kolb*, 100 F.2d 920, 925 (9th Cir.). To the same effect are: *Commissioner v. Stinchfield's Estate*, 161 F.2d 555, 556 (9th Cir.); *Hormel v. Helvering*, 312 U.S. 552, 560; *Helvering v. Rankin*, 295 U.S. 123, 131. And see *Securities Comm'n v. Chenery Corp.*, 318 U.S. 80, 88.

But the record contains nothing in support of this argument and in fact is all to the contrary. There is express testimony that the Bank, in January 1941, was promptly informed that the partnership had taken over the lumber and building supply business (R. 189, 190). There is no evidence whatsoever that any supplier or purchaser or anyone else who dealt with the partnership believed, or had reason to believe, that he was dealing with petitioner, or with the partnership and petitioner, rather than with the partnership alone. In January 1941, the partnership filed an assumed business name certificate with the County Clerk of Lane County, Oregon, and published notice to this effect (R. 36-37, 135-136, Pet. Exh. 19; Br. p. 16).

Business purpose and tax motive: "substance versus form." Our main brief has dealt at length with the question of business purpose, tax motive and substance versus form (Br. pp. 25-28, 28-33, 33-36, 44-49). The Commissioner's treatment of this subject does not attempt to meet our analysis, but, like the opinion of the single judge below, mingles together and confuses two separate fields of inquiry (Com. Br. pp. 16-18).

(1) *The transfer of the business from petitioner to the partnership.* Upon a careful reading, it will be seen that neither the opinion below nor the Commissioner's brief maintains that the transfer of the business *from* the petitioner *to* the partnership was dominated by a motive to avoid corporate taxes. Yet it is corporate taxes (not personal income taxes) which alone are involved in this proceeding.

As we have pointed out, the single judge below made no finding as to tax motive, though mentioning in his opinion

“reallocation of income among family groups” (Br. p. 11, fn. 3). The judge, in his opinion, referred to Scharpf’s desire for a larger participation in the profits and for a form of organization which would permit him to get out more readily. He then spoke of Scharpf’s expectation that Rogers (who owned 50% of the corporate stock) should have a half interest in the partnership, and of Roger’s decision that his wife also should become a partner (R. 283). It will be seen that these comments, insofar as they have any bearing on taxes, do not single out as significant the discontinuance of the business in corporate form (i.e., corporate taxes) but, rather, the ownership of the business as reflected in the *composition* of the partnership (i.e., personal income taxes).

The Commissioner’s brief approaches the matter in back-handed fashion by arguing that there was no “business purpose” for the transfer of the business to the partnership (Com. Br. pp. 17-19), but the record is explicitly to the contrary (Br. pp. 10-11, fn. 3, 45-47). Scharpf wanted a partnership for reasons which had nothing to do with taxes and a partnership in fact came into existence and operated the business.⁷

Like the “unitary” business argument (*supra*, pp. 2-4), business purpose and tax motive are significant only as they throw light on the fundamental question whether the entity involved can be disregarded as a sham or fraud. A familiar mode of stating this test is that the tax laws “look to substance rather than to form” (Br. pp. 25-31

7. Without interrupting the continuity of the argument at this point, we summarize, *infra*, pp. 12-13, the evidence bearing on tax motive.

and cases there cited). Where the thing done is transitory in nature and for this or other reasons appears *equivocal*, then purpose, motive, "unitary" nature of the business, may throw revealing light on the true nature of the transaction. "* * *" in interpreting an equivocal transaction motives may be considered as bearing on the real nature thereof." *Brunton v. Commissioner*, 42 F.2d 81, 82 (9th Cir.), certiorari denied, *sub nom.*, *Brunton v. Burnet*, 282 U.S. 889. But where the thing done has substance and hence is not a sham or fraud, as where a new entity in fact comes into existence and operates a business throughout the years, then a tax saving motive and the other considerations here mentioned become immaterial. A method "avowedly chosen in order to reduce taxes" must be respected by the tax collector if it is "real" and not a "sham." *United States v. Cumberland Public Service Company*, 338 U.S. 451, 453, 455.⁸

The reasons summarized in the preceding paragraph justify our repeated insistence that in this case the elements of tax motive and purpose, even had they existed, would be deprived of all significance (Br. pp. 28-33, 44-47). For here there was nothing equivocal; petitioner in fact transferred the business to another entity; the partnership in fact came into existence and has operated the business through the years since 1940. The partners contributed

8. In addition to the cases cited in our main brief, reference may also be made to the following statement of the law in *John Wachtel Corp.*, 4 T.C.M. 768, 771:

"We know of no law which prevents stockholders of a corporation from changing the operation of a business by a corporation to operation by a partnership. That is frequently done; and if the purpose is to avoid burdensome corporate taxes, it is not, by reason of that fact alone, invalid."

their individual capital, a partnership agreement was signed, and all requirements of applicable partnership law were faithfully satisfied. Consideration was paid in full for the assets transferred to the partnership by petitioner. The partnership hired its own employees, some 30, and conducted its own business in its own name and on its own credit. Rogers and Scharpf continued to head the business, but not as corporate officers; they and the other partners now exposed themselves to personal liability and all the other incidents of the partnership relation (Br. pp. 12-16).

(2) *The inclusion of the two wives as members of the partnership.* On any conceivable view, a partnership came into existence, of which at least Messrs. Rogers and Scharpf were members. As we have previously pointed out, the single judge of the Tax Court appears to have decided the case on the erroneous theory that the case is governed by the same principles that would apply to the issue whether the two wives could also be regarded as members of the partnership. It was in this connection that the single judge spoke of "a reallocation of income among family groups" (R. 283).

Under *Commissioner v. Culbertson*, 337 U.S. 733, it seems clear that the two wives must be regarded as *bona fide* partners. We again point out, however, that this is not the question at issue in the present case. It is sufficient here that a partnership was created, of whomever composed, and that the business was in fact transferred to and operated by such partnership. If this was accomplished, then petitioner cannot be taxed on the income of the partnership. Whether the income reported by the wives can be attributed and taxed to the husbands is a wholly separate question, outside the scope of the present case.

The Commissioner's brief falls into the same error as did the opinion of the single judge, but adds nothing by way of discussion and clarification.⁹

Although not essential, it will perhaps be useful in concluding this discussion to summarize the significant facts bearing upon the inquiry as to tax purpose. Viewing the record as a whole, it is quite understandable that the single judge should have been unwilling to make a finding of a tax avoidance motive as to any aspect of the transfer of the business or of the formation of the partnership (Br. pp. 10-11, fns. 2, 3, 28-36, 44-49).

Scharpf wanted to do business in partnership form for reasons having nothing to do with taxes. At the time of his proposal, taxes could have been no significant problem, for the business was scarcely profitable and the war-time excess profits tax had not even been enacted. As the result of the transfer of the business to the partnership, Scharpf increased his interest as a proprietor from less than 5% to 25%. He and Rogers headed the business and, if anything, the partnership arrangement more accurately reflected Scharpf's contribution to the enterprise than did the corporate form of doing business. Also, it *increased* Scharpf's personal income taxes.

Rogers at first opposed the partnership, and for strictly business reasons; he did not like the unlimited personal

9. In addition to the cases cited in our main brief at p. 37 there should be added *John L. Denning & Co. v. Commissioner*, 180 F.2d 288 (10th Cir.), decided February 8, 1950, reversing the decision of the Tax Court and holding that the income of the partnership there involved could not be taxed to the petitioner corporation.

liability of a partner. He finally consented, on condition that petitioner corporation should continue to hold the real estate. Ironically, it is only the continued existence of the petitioner corporation which makes possible the present controversy. Yet, it was Rogers, opposing the transfer—not Scharpf, favoring it—who wanted petitioner continued. Further, the only new proprietor of the business was Mrs. Rogers. Apart from the fact that as of 1941 her interest could easily have turned out to be worth less than she paid for it, it is significant here also that it was not her husband, but Scharpf, who pressed for the formation of the partnership.

It is clear, therefore, that an underlying purpose of tax avoidance simply cannot be extracted from this record.

II.

The single judge below entered his findings of fact and opinion, directing that decision should be entered under the Tax Court's Rule 50. In computing the deficiencies for the years 1943 and 1944 resulting from his previous determination, the single judge proceeded to deny to petitioner the credits against the partnership income to which it would have been entitled if such earnings belonged to it (Br. pp. 51-55). The Commissioner's brief does not attempt to defend the denial of these credits under Sections 710-720, Internal Revenue Code. It insists, nevertheless, that petitioner had waived a correct computation of its taxes (Com. Br. pp. 19-20).

We do not question the power of the Tax Court to prescribe its own rules of practice and procedure, under Section 1111, Internal Revenue Code. The question, rather,

is whether anything in the terms of Rule 50, or in previous decisions thereunder, fairly put petitioner on notice that it should have taken any action other than what it took to preserve its right to a fair and just computation of its taxes. It is not open to the Tax Court under the procedural due process guaranteed by the Fifth Amendment, nor within its statutory rule-making authority, so to interpret its Rules as to deny to a taxpayer a fair hearing on issues governing the amount of a claimed tax deficiency.

We have previously shown that neither the terms of Rule 50 nor previous interpretations justify the result reached in the present case (Br. pp. 56-61). The cases cited by the Commissioner (Com Br. pp. 19-20) do not meet the facts in the instant case, for they involve new issues asserted by the Commissioner, by the taxpayer or by both, or by the Tax Court itself, *falling outside a correct computation of the tax under the findings of fact and opinion of the Tax Court*. For example, *Fifth Street Bldg. v. Commissioner*, 77 F.2d 605 (9th Cir.), upon which the Commissioner principally relies, involved a question as to computation of invested capital for the year 1921 and a second question as to depreciation for the year 1926. From the report of the case, it appears that after the Board (now the Tax Court) had entered its findings of fact and opinion as to these two questions, and when the case came on for decision under Rule 50, the Commissioner for the first time moved to disallow depreciation for the year 1921; and the taxpayer then moved to exclude certain rentals for that period. Since these were new issues, not relating to a correct computation under the Board's prior determination,

the Board properly denied *both* motions. It was these rulings that this Court sustained (77 F.2d at pp. 608-609).

In connection with our brief discussion of the scope of review in Tax Court cases (Br. III, pp. 61-62), we call to the attention of the Court the recent decision of the Court of Appeals for the Second Circuit in *Orvis v. Higgins*, 180 F.2d 537, which supports our discussion of the test to be applied by the reviewing court.

Respectfully submitted,

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June 15, 1950.



No. 12378

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, and Its Agent, LLOYD A. MASHBURN; MILL-WRIGHT AND MACHINERY ERECTORS, LOCAL 1607, OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L., and Its Agent, HERMAN BARBAGLIA,

Appellants,

vs.

HOWARD F. LEBARON, Regional Director of the Twenty-first Region of the NATIONAL RELATIONS BOARD, for and on Behalf of the NATIONAL LABOR RELATIONS BOARD,

Appellee.

APPELLANTS' OPENING BRIEF.

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No. 12378

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, and Its Agent, LLOYD A. MASHBURN; MILL-WRIGHT AND MACHINERY ERECTORS, LOCAL 1607, OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L., and Its Agent, HERMAN BARBAGLIA,

Appellants,

vs.

HOWARD F. LEBARON, Regional Director of the Twenty-first Region of the NATIONAL RELATIONS BOARD, for and on Behalf of the NATIONAL LABOR RELATIONS BOARD,

Appellee.

APPELLANTS' OPENING BRIEF.

Jurisdiction of This Court and the District Court.

As alleged in the Petition below jurisdiction thereof and jurisdiction to issue the temporary injunction appealed from by appellants' notice of appeal to this Court [Tr. 123], is conferred by Section 10-1 of the Labor Management Relations Act of 1947 [Tr. 4]. More basically, the right of the Board to apply for that injunction depends on whether the conduct alleged against respondents below

and appellants here affects commerce within the meaning of Section 2, Subsections (6) and (7) of the Act. The commerce allegations of the Petition are to be found in Paragraph 9, Subsections a, b, c, e, f, and g of the Petition [Tr. 5-9, incl.] and commerce affidavits filed by Wm. L. Sheets [Tr. 26] and Wm. L. Budge [Tr. 28]. Commerce is denied by Respondent's Return, Paragraph IX [Tr. 43] and by the Mashburn affidavit [Tr. 55] and one of the contentions of appellants in this appeal is that no sufficient showing on commerce was before the District Court. This Court has jurisdiction of the appeal under 28 U. S. C. A. 225.

Statement of the Case.

Appellants are a local labor organization operating in Los Angeles County, California, comprised of workingmen who follow the trade of setting and installing machinery, and affiliated with the Carpenters Brotherhood, American Federation of Labor; the Building Trades Council of that county operating under the Building Trades Department of the American Federation of Labor; and the individual executive heads of the two organizations.

Pursuant to their notice of appeal [Tr. 123] they come here for relief from a judgment of the District Court [Tr. 121], the judgment being one of injunction against appellants, and ask this Court to strike down that judgment, order it vacated, and to relieve appellants from its restraints and inhibitions.

The petition for injunction here is by an officer of the National Labor Relations Board under Section 10-1 of

the Taft-Hartley Act upon a charge of violation of Section 8(B)(4)(D), the “jurisdictional strike” section of that Act.

Whether or not petitioners showing below is sufficient under the sections mentioned, it is a showing, as to acts of appellants, lawful, if prior to, and except for, the Taft-Hartley Law.

Possibly by accident as much as by design, the Transcript here provides a remarkably clear view of the workings of the union unfair labor practice provisions, the injunction provisions, and the jurisdictional strike provisions of the Taft-Hartley Act.

As will be seen by the Board’s Decision in the 10-K proceeding [Tr. 229 at Tr. 237] this case was the fourth to come before the Board after a 10-K hearing, and the Board’s Decision here is their fourth 10-K Decision. It was the first case to come before the Board after hearing on a complaint issued under Section 8(B)(4)(D) charging the union unfair labor practice of jurisdictional strike, and was argued before the Board January 5, 1950. Following the Board Decision further we find approximately 650 members of unions affiliated with appellant council working for Stone and Webster, ostensibly the general contractor, and for subcontractors, on a power plant for Edison [Tr. 233, 234, 235]. Westinghouse, on a direct contract with Edison, installs turbo-generators exclusively with Machinists, an independent union, to the exclusion of Millwrights, an American Federation of Labor union [Tr. 235, 238] though having no right to give exclusive

employment privileges to the Machinists under Section 8-a-3 of the Taft-Hartley Act [Tr. 240].

The gist of the charge against appellants is that on February 2, 1949, all of the American Federation of Labor workers refused to work on the job and that on March 29, 1949, certain American Federation of Labor Ironworkers refused to work with the Machinists employed by Westinghouse, in violation of Section 8(B)(4)(D) [Tr. 9, 10]. As will be seen from the affidavit of Mashburn, Secretary-Treasurer of the American Federation of Labor Council, the Machinists have never been certified to represent any Westinghouse workers under the Act nor become entitled to any preference in hiring under Section 8-a-3 thereof [Tr. 57], and the actions alleged against the American Federation of Labor in the petition were for the purpose of breaking up the unfair labor practice existing between Westinghouse and the Machinists and getting American Federation of Labor members the employment opportunities from which they were being excluded under the practices and agreements between Westinghouse and the Machinists in violation of Sections 8-a-1, 8-a-3, 8-b-1, and 8-b-2 of the Act [Tr. 54]. The Return to the Rule to Show Cause also denies that the activities of February 2, 1949, were anything but a concerted protest, authorized by Section 7 of the Act, against the unfair labor practice on the part of Westinghouse and the Machinists above-mentioned [Tr. 45] and that the activities of the ironworkers on April 11, 1949, were anything more than a protest on their part to obtain a collective agreement with Westinghouse (as alleged in the affidavit

of the Westinghouse superintendent attached to the petition) [Tr. 47, 31], and a protest under Section 7 of the Act against the Westinghouse-Machinist unfair labor practice. Attached to the Mashburn affidavit is the secondary boycott charge against the American Federation of Labor which was dismissed or never acted upon, the charge of unfair labor practice against Westinghouse and the Machinists which was pending; the contract between Edison and Stone and Webster is also attached so that it may be seen that in all matters Stone and Webster is merely the agent of Edison, and letters are also attached to show that in the installation of the equipment, which is all that is involved in the labor dispute, Westinghouse also is an agent of Edison. The work belongs to the American Federation of Labor under the American Federation of Labor-Stone and Webster contract, behind which Edison is operating [Tr. 236].

The long affidavit beginning at Tr. 124 serves the purpose of bringing in admissions of representatives of Westinghouse and the Machinists as to the unfair labor practice being maintained by them and the letters at Tr. 222, 223, 224, 225, 226 and 227 are for the same purpose.

It will be noted that while the Board's decision after the 10-K hearing is dated May 11, 1949, and allows ten days for compliance, a petition for injunction was filed May 3, 1949 [Tr. 13, 83] and heard May 16, 1949 [Tr. 38].

As is usual in matters involving the construction trades, wherein work is completed in limited periods, instead of

going on indefinitely as in factories, the so-called temporary injunction obtained by unusual haste of the Board's General Counsel in protection for the Westinghouse Company against union activity will be as useful to the fortunate employer as a determination on the merits by the Board.

While the unions contend that the other subsections of Section 8 are for the purpose of permitting non-unionists to enjoy the benefits of union membership, compelling unionists to break each others strikes and tear down each others wages and working conditions, and to encourage the production of non-union products by forcing unionists to add labor to them, the charge against subsection B-4-D is that it ousts the Board of jurisdiction to determine representation and invests the employer with that power. It will be noted that the dispute here is not an overlapping of jurisdiction on the edges but a claim by each of two unions for the whole of the work [Tr. 56, 57, 213].

It is the contention of the unions that this is not a jurisdictional dispute, but a dispute over representation and this is the view of the two members of the Board who dissented in the three previous 10-K cases [Tr. 237].

We invite attention to the injunction here from the aspect of its invasion by its sweeping terms of personal rights, its rubber stamping of the employment policy as fixed by the employer, and its substitution of an administrative officer's views for proof as a basis of jurisdiction.

Points on Appeal; Specifications of Error.

I.

If it was intended by Congress that Section 8(B)(4)(D) Title I of the Labor Management Act of 1947 should prohibit a union and its members to strike to win from an enemy union or from non-union employees contested work opportunities or to refuse to perform services for the employer in that situation, said section of said Act is in that respect unconstitutional and void because in violation of the First, Fifth and Thirteenth Amendments of the Constitution of the United States.

II.

The injunction appealed from was issued upon evidence insufficient to warrant the issuance thereof.

III.

Petitioner below showed no probable, sufficient or any cause or finding thereof to apply for the injunction appealed from.

IV.

The trial court erred in issuing the injunction on proof that petitioner had reasonable cause to believe that the charge was true and a complaint should issue, such showing being sufficient on charges of violation of Sections 8(B)(4)(A), 8(B)(4)(B) and 8(B)(4)(C) of the National Labor Relations Act as amended, hereinafter called the Act, but not on charges of violation of Section 8(B)(4)(D).

V.

The trial court had no jurisdiction to entertain a petition for injunction within the time allowed for voluntary compliance with the decision of the Board under Section 10-K of the Act.

VI.

The injunction appealed from was issued to restrain a strike by appellants against the Machinists and Westinghouse for violation of Sections 8-a-1, 8-a-3, 8-b-1 and 8-b-2 of the Act constituting Unfair Labor Practices under the Act, which excluded members of appellants from employment; on the evidence the work stoppage is a result of the illegal closed shop contract; an unfair labor practice strike is protected union activity.

VII.

The injunction appealed from is couched in the language of the Act, is so vague and indefinite that it is impossible to ascertain therefrom what conduct is allowed and what conduct is forbidden, and is contrary to Rule 65(d).

VIII.

The injunction appealed from is broader than the dispute involved and decided by the Board, unnecessarily restricts the rights of the union members, compels them to work against their desires and prohibits their withholding their services.

IX.

The Act does not confer jurisdiction on the Board to hear and determine matters such as are presented in this case arising out of a building enterprise purely local in nature and not contributing to the flow of interstate commerce, and hence the District Court had no jurisdiction to entertain the petition.

X.

The Sixth Finding of Fact based on the Second Amended Charge erroneously supports the injunction with matters not considered by the Board or on which there has been a 10-K hearing.

XI.

The acts and conduct of the Respondents below justifying the issuance of the injunction are not found or specified in reasonable detail.

XII.

The injunction is not limited to proper *pendente lite* relief but finally determines the issues presented by the charges against the unions and grants full and final relief against them without trial.

XIII.

The injunction erroneously omits to preserve to the unions the rights guaranteed by Section 8-C of the Act in failing to exclude from its prohibitions acts which do not involve threats or reprisal or promises of benefit.

I.

If It Was Intended by Congress That Section 8(B) (4)(D), Title I of the Labor Management Act of 1947 Should Prohibit a Union and Its Members to Strike to Win From an Enemy Union or From Non-Union Employees Contested Work Opportunities or to Refuse to Perform Services for the Employer in That Situation, Said Section of Said Act Is in That Respect Unconstitutional and Void Because in Violation of the First, Fifth and Thirteenth Amendments of the Constitution of the United States.

Labor unions have the right to exist and to function. That right is guaranteed by the First Amendment to the Constitution of the United States. The right is also pronounced as a policy of the United States in Title I, Section 1 of the Taft-Hartley Act. The right of workers to organize into labor unions is the right peaceably to assemble and to redress grievances.

“It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . and therefore are united in the First Article’s assurance.”

Thomas v. Collins, 323 U. S. 516, 530.

No labor union could function or continue in being if it did not have the right to discipline and control its membership for violation of lawful union principles.

Those who would deny the right to strike and peaceably picket have always argued that peaceful picketing and strikes may be banned because its purpose is to persuade

persons not to perform services nor to purchase merchandise and that the resultant detriment to the business involved should take precedence over the workers' interests. It was on this theory that Shasta County, California, sought to justify the ban on picketing which was invalidated by the Supreme Court in *Carlson v. California*, 310 U. S. 106, 112. There the court said:

"It is true that the ordinance requires proof of a purpose to persuade others not to buy merchandise or perform services. Such a purpose could be found in the case of nearly every person engaged in publicizing the facts of a labor dispute; every employee or member of a union who engaged in such activity in the vicinity of a place of business could be found desirous of accomplishing such objectives; disinterested persons (who might be hired to carry signs) appear to be a possible, but unlikely, exception. In brief, the ordinance . . . proscribes the carrying of signs only if by persons directly interested who approach the vicinity of a labor dispute to convey information about the dispute."

The rule is now as Mr. Justice Brandeis said it should be in his dissent in *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association*, 274 U. S. 37, 56:

"The Constitution of the Journeymen Stonecutters' Association provides: 'No member of this association shall cut, carve or fit any material that has been cut by men working in opposition to this association' So far as concerned the association, the individual stonecutter was not free. He had agreed, when he became a member, that he would not work on stone 'cut by men working in opposition to' the association. *It (the union) was in duty bound to urge upon its members observance of the obligation as-*

sumed . . . The controversy out of which it arose, related, not to specific grievances, but to fundamental matters of union policy of general application throughout the country. The national association had the duty to determine, so far as its members were concerned, what that policy should be. It deemed the maintenance of that policy a matter of vital interest to each member of the union. The duty rested upon it to enforce its policy by all legitimate means.” (Emphasis added.)

“The case confronts us again with the duty our system places on this Court to say where the individual’s freedom ends and the State’s power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . . *That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions.* And it is the character of the right, not of the limitation, which determines what standard governs the choice . . .

“For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, *must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount in-*

terests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.” (Emphasis added.)

Thomas v. Collins, supra.

The emphasis as indicated in the *Collins* case is upon the protection and preservations of liberties secured by the First Amendment. The liberties under the Fifth and Thirteenth Amendments are equally secured. These liberties do not permit dubious intrusion. Only the gravest abuses endangering paramount interests give occasion for permissible limitation. It is submitted that none of these qualifications exist here. Rather there is no public danger, actual or impending. The case comes down merely to the employment of an individual and in seeking to invoke the employment of one individual the case would cause 700 employees to violate their union obligations and forego the right which the *Bedford Cut Stone* and *Thomas v. Collins* cases clearly indicate are constitutionally protected. It should be unnecessary to point out that Congress possesses no power to set aside the constitutional guaranties.

The withdrawal of the members of the Los Angeles Building and Construction Trades Council and of the picketing that did exist was admittedly peaceful. The purposes sought to be attained by this activity are those which long ago prompted Chief Justice Taft in *American Steel Foundries v. Tri-City Central Trades Council*, 42 S. Ct. 72, at page 78, to say:

“It is helpful to have as many as may be in the same trade, in the same community, united, because in the competition between employers they are bound to be affected by the standard of wages of their trade

in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild.”

Neither by Congressional Act nor by decree of the highest court can the fundamental rights of the First Amendment be abridged or denied where those rights are peaceably exercised and in the pursuit of a lawful objection. The scope of the First, Fifth and Thirteenth Amendments is not confined by the notion of Congress regarding the limits to be imposed in an industrial dispute. *American Federation of Labor v. Swing*, 61 S. Ct. 568, and the interdependence of economic interests of all engaged in the same industry has become a commonplace.

American Steel Foundries v. Tri-City Central Trades Council, supra.

These rights, therefore, cannot be mutilated by denying them to the worker in a dispute with an employer *even though they are not in his employ*. Communication by such employees of the facts of a dispute deemed by them to be relevant to their interests “can no more be barred because of concern for the economic interest against which they are (acting)”

Senn v. Tile Layers Union, 301 U. S. 468;

American Federation of Labor v. Swing, supra.

The court in *Thornhill v. Alabama*, 310 U. S. 88, cogently reinforces this position. In declaring an anti-picketing statute of the State of Alabama unconstitutional, the Supreme Court said:

“In the circumstances of our times the dissemination of information concerning the facts of a labor

dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing.”

Not only are the constitutional expressions of the Supreme Court adverse to the legislation here considered, but the Supreme Courts of several states have taken a similar view. The Supreme Court of California in *In re Blaney*, 184 P. 2d 892, 30 Cal. 2d 643, struck down the California Act similar in terms to Section 8(B)(4), holding it unconstitutional because of its conflict with United States constitutional provisions. In that case Blaney had been found guilty of contempt for causing or threatening to cause employees to cease performing services. The California court, in reaching its decision, quoted approvingly from an earlier decision of that court (*Steiner v. Long Beach Local*, 19 Cal. 2d 676) as follows:

“It is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions and they act peaceably and honestly.”

The California Court supported its conclusions with *American Federation of Labor v. Swing*, *supra*, and *Bakery Drivers Local v. Wohl*, 62 S. Ct. 816.

Section 8(B)(4)(D) is unconstitutional for the further reason that it compels involuntary servitude or services by employees against their will.

“The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community.”

Stapleton v. Mitchell, 60 Fed. Supp. 51, at 61.

In this case the constitutionality of the 1943 Kansas labor law was under attack as being in contravention of the First and Thirteenth Amendments. A portion of that statute made it unlawful for any person to refuse to handle, install, use or work upon particular materials or equipment, *or to cause any cessation of work or interfere with the progress of work by reason of any jurisdictional dispute, grievance, or disagreement between or within labor organizations*. A three-judge Federal Court, composed of two Circuit Court judges and one District judge, held this portion of the statute to be unconstitutional and void on its face, and entered an injunction against the State of Kansas from enforcing or giving effect thereto. And even though one of the judges dissented he agreed with the majority in this respect.

In the course of this opinion the court pointed out:

“That the existence and operation of a labor union necessarily involves the integrated, correlated and concerted activities of everyone connected with the organization, from the individual member to the highest official; that the activities of the individual member

as he goes about his daily work preaching the doctrine of unionism is the heart and soul of the organization and without which it cannot exist. It is also established that the life and strength of a labor organization is dependent upon the free exercise of speech, press and assembly, by all those who further its objects, regardless of their status in relation to the organization. It is plain also that compliance with certain provisions of the Act is a condition precedent to the exercise of whatever rights are involved in the functioning of a labor organization, and it is of course fundamental and self-evident that free speech, press and assembly are sacred human liberties, and their free exercise cannot be made to depend upon any condition imposed by state law, nor may they be previously restrained in the absence of clear and present danger to the community.”

The court then went on to review the *Senn*, *Thornhill*, *Meadowmoor*, *Swing*, *Wohl* and *Ritter* cases, and concluded that:

“Since picketing is only one of the familiar weapons used by unions in attainment of their economic objectives, we think the philosophy of the cases which have defined the quality of free speech inherent in picketing *furnishes a reliable criterion for the determination of the quality of the rights involved in the whole of the economic struggle in the field of industrial relations.*”

The rationale of the *Stapleton* case and the cases therein cited is that the refusal to handle or install, use or work upon particular material or to cause any cessation of work or interfere with the progress of work by reason of any jurisdictional dispute, grievance or disagreement between or within labor organizations are rights protected by the

constitutional guaranty, and it was on this premise that the court struck down the portions of the statute which were designed to outlaw jurisdictional disputes, holding that such legislation contravened the constitutional protections provided by the First and Thirteenth Amendments.

What the Kansas statute sought to attain is identical with the prohibitions found in Section 8(B)(4)(D) of the Taft-Hartley Act. That section seeks to outlaw so-called jurisdictional disputes. It prohibits a strike or concerted refusal to work when there is a dispute over what employees in a union, "trade, craft, or class" are to do certain specified work. Such prohibitions cannot prevail against the constitutional guaranty so forcefully described and reasoned in the *Stapleton* case, *supra*. It is evident that the danger of injury to the industrial concern here involved is neither so serious nor so imminent as to justify the sweeping proscription of freedom embodied in Section 8(B)(4)(D). (See *Thornhill v. Alabama*, *supra*.)

Section 8(B)(4)(D) is invalid for a still further reason in that it sets up and imposes a system of compulsory arbitration which deprives the Los Angeles Building and Construction Trades Council, its affiliates and members, of property and liberty of contract without due process of law.

In *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, there was involved the validity of the Court of Industrial Relations Act of the State of Kansas. That Act vested in an industrial court power upon its own initiative or upon complaint to summon the parties and hear

any dispute over wages or other terms of employment in any industry, and after such hearing to fix wages or terms and conditions of employment in the particular industry involved. The Supreme Court, speaking through Chief Justice Taft, invalidated this portion of the Kansas statute for the reason that it curtailed the rights of the employer and the employee to contract about their affairs. The court said:

“This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment (citing cases). . . . Freedom is the general rule, and restraint is the exception. The legislative authority to abridge can be justified only by exceptional circumstances.”

The Chief Justice pointed out in the course of the opinion that the parties were bound by the findings of the industrial court and the worker, while not required to work, was forbidden under the penalty of fine or imprisonment to strike against the finding of the industrial court, and “thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows give him.” The Chief Justice concluded by holding that the provisions of the Act which gave the industrial court the power to summon the parties and to fix their working conditions deprived the parties of the liberty of contract, which deprivation was constitutionally invalid.

In a subsequent case, *Dorchy v. State of Kansas*, 264 U. S. 286, the United States Supreme Court, speaking

through Mr. Justice Brandeis, restated its conclusions reached in the *Wolff Packing Company* case, and again held that a system of compulsory arbitration violates the Federal Constitution.

In the instant matter there is no doubt that a 10(k) proceeding, bottomed though it is on Section 8(B)(4)(D), is a system of compulsory arbitration. As originally written, Section 10(k) provided for the appointment of an arbitrator to resolve jurisdictional disputes, but the word arbitrator was stricken in conference and the Board was substituted in its place. (See Conference Report.) That it is a matter of arbitration is frankly conceded by members Murdock and Houston in their dissenting opinion in *Juneau Spruce Corporation*, 82 N. L. R. B. No. 71, decided April 1, 1949. It is not arguable that the mere substitution of the Board for the arbitrator destroyed the effect of compulsory arbitration which the Congress wrote into the Act, for as indicated in the *Wolff Packing Co.* and *Dorchy* cases, the exercise of the compulsory arbitration power there was to be performed by a court of industrial relations composed of three judges.

In effect the Supreme Court held that it is of no matter what the tribunal is called, it is the deprivation of the right to freely contract that the court holds sacred and has stated may not be destroyed by legislative enactment.

Nor is it an answer to say that Section 10(k) is not compulsory arbitration because it allows an appeal by indirect means to test the validity of the determination thereunder. The Kansas Act also allowed an appeal in

the Supreme Court of the State of Kansas, but notwithstanding this protective device the Supreme Court of the United States in the Kansas case held that statute as a deprivation of property and liberty in contravention of the Federal guaranty.

It therefore follows that Section 10(k), since it imposes itself upon the disputants against their voluntary acquiescence, is a system of compulsory arbitration, and under the holding of the Supreme Court in the *Wolff Packing Co.* and *Dorchy* cases offends the Constitution and is null and void.

In the only other case we have found in which injunction was issued by a District Court on a charge of violation of Section 8(B)(4)(D), the case of the *Carpenters and Roofers and Goodwin and Dollger*, U. S. District Court, Northern District of California, Southern Division, August 30, 1949, C. C. H. Par. 65321, the unconstitutionality of Sections 10-K and 10-L as an improper delegation of legislative power was raised against the petition as an affirmative defense.

While we are aware of the decision of this court in *LeBaron v. Printing Specialties (Sealright)*, 171 F. 2d 331, involving Sections 8(B)(4)(A) and (B), we contend that we here raise issues unconsidered by this court in that case or by the District Court in Los Angeles in this case or by the District Court in San Francisco in the *Carpenters and Roofers* case.

II.

The Injunction Appealed From Was Issued on Evidence Insufficient to Warrant the Issuance Thereof.

In treating the position of the court in 8(B)(4)(A) matters (secondary boycott) the 10th Circuit Court of Appeals clearly and forcefully pointed out that courts are not required to forego their usual equity roles where these types of cases are before them.

In *United Brotherhood of Carpenters v. Sperry*, 170 F. 2d 863, at 869, the court said:

“It is not the inflexible duty of the court in every case of this kind to grant a temporary injunction to remain in force and effect until the Board makes its final adjudication of the charge of unfair labor practice. The court has a reasonable permissive range for the exercise of its discretion in the granting of injunctive relief appropriate to the particular circumstances presented, or in withholding its writ.”

While the trial court quoted this language in its Opinion [Tr. 92], we submit that in following the spirit thereof the trial court would have been led to a denial of the injunction. The transcript contains the papers that were before the trial court and there was no oral evidence. Considering the petition and the answer, the affidavits filed for petitioner and for respondents, the preponderance of evidence is against such effect on commerce as to confer jurisdiction under Section 2, Subsections (6) and (7) of the Act. (*Industrial Association v. U. S.*, 268 U. S. 64.)

It was our position on this point, with which the trial court seemed to agree, that whether or not the trial court might substitute the judgment of the Regional Director for its own in the determination as to whether the *acts* constituting an unfair labor practice has been committed, the facts showing commerce had to show by a preponderance of the evidence in the trial court.

That the evidence in the trial court is *against* jurisdiction is due to the fact petitioner proceeded on the theory that the Regional Director's finding or reasonable cause to issue a complaint was binding on the trial court in the matter of jurisdiction. We think the Regional Director's judgment as to jurisdiction was no substitute for proof in the trial court.

Hecht v. Bowles, 321 U. S. 329, 137 F. 2d 689, 49 Fed. Supp. 528, went up to the Supreme Court on an opinion by the Circuit Court for the District of Columbia that the O. P. A. administrator was entitled to injunction as of course under the Emergency Price Control Act. In reversing, the Supreme Court had occasion to say of the theory that this emergency legislation abdicated the discretion and evidentiary basis for equity action:

“We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied”

We ask the appellate court, not for a review of a decision on the weight of the evidence, but for a reversal because the trial court has followed the federal “subpoena enforcement” cases, *I. C. C. v. Brinson*, 154 U. S. 447; *Endicott Johnson v. Perkins*, 317 U. S. 501, and apparently failed to weigh the evidence herein.

III.

Petitioner Below Showed No Probable, Sufficient or Any Cause or Finding Thereof to Apply for the Injunction Appealed From.

The charge [Tr. 14], the amended charge [Tr. 17] and the second amended charge [Tr. 21] were attached to the Petition. They were all filed with the National Labor Relations Board by a labor organization, the Machinists. They are merely in the nature of accusatory documents filed with a district attorney. The National Labor Relations Board has recently so held in *Cathey Lumber Company*, C. C. H. Par. 9280. In Paragraph 9 of the Petition it is alleged that the Regional Director has reasonable cause to believe that the second amended charge is true, that a complaint should issue on it, and that respondents have violated 8(B)(4)(D) and that such violations affect commerce under Section 2, Subsections 6 and 7. These beliefs are alleged to have been arrived at by the Regional Director as a result of investigation, the nature of which is not touched upon.

While the reasonable belief of the administrative officer is alleged to be upon the basis of the investigation, the allegation of reasonable cause is otherwise purely a conclusion.

The trial court ventures the statement: "The action of the Board, in making a determination under the provision of 10-K of the Act, is a confirmation of reasonable cause to believe that the charge is true." Such an interpretation is a perversion of the purpose of hearings under

10-K, which are not hearings on charges; in every 10-K decision including the one involved in the present case, the Board has emphasized that the only function it can perform under the Act as written is to rubber stamp the employer's choice as to which employees would do the work [Tr. 237—see footnote].

Putting the matter simply: the trial court never received or called for preponderating evidence that the acts constituting the unfair labor practice had occurred. In the face of allegations of the petition and petitioner's affidavits fully traversed by the return and by respondents' affidavits, the trial court made no effort to resolve the conflict, but held in favor of petitioner either by crediting an averment purely by way of conclusion as to the state of petitioner's mind, or by crediting as persuasive evidence the order of the Board on the 10-K hearing which was clearly incompetent except as evidence that the 10-K hearing had been held.

In Point I above we pointed out the threat of 8(B)(4) (D) to Free Speech and Assembly and its tendency to impose Involuntary Servitude, in violation of the First, Fifth and Thirteenth Amendments to the Constitution of the United States. This threat is greatly enhanced under petitioner's view of the limited discretion of the trial court in performing an ancillary function to the Board's responsibility under Section 10.

It will be seen that the decree in this case only inferentially prohibits picketing, publication, communication by letter and word of mouth and unfair listing, and directly

proceeds to invade and destroy the right to refuse to work [Tr. 122]. This in a situation where violent, untruthful, or improper picketing or picketing at all is not even alleged (*Milkwagon Drivers v. Meadowmoor Dairies*, 312 U. S. 287), and where the dispute, on petitioner's own contentions, concerns the representation of labor. (*United States v. Hutcheson*, 312 U. S. 219.)

It was of such decrees that Mr. Justice Brandeis, dissenting in *Bedford Stone Co. v. Journeymen Stone Cutters*, 274 U. S. 37, said:

“ . . . If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds one of involuntary servitude.”

Upon the theory of petitioner here, developed more fully in the *Sealright* case, *supra*, the District Court is a rubber stamp for the Board which is in turn, by its own admission, merely a rubber stamp for the employer who under the Taft-Hartley Law has ousted the Board of the right to determine the representation for his employees which it formerly exercised under the Wagner Act.

Our complaint is not of the use of discretion by the trial judge, but of what we conceive to be his refusal to exercise his discretion in accordance with “traditional equity criteria.”

At no stage of the proceedings has anyone met our contention in Paragraph VII of the Return [Tr. 42] that the implied finding that the 8(B)(4)(A) charge against us is unsupported is inconsistent with a finding that the 8(B)(4)(D) charge is supported.

IV.

The Trial Court Erred in Issuing the Injunction on Proof That Petitioner Had Reasonable Cause to Believe That the Charge Was True and a Complaint Should Issue, Such Showing Being Sufficient on Charges of Violations of Sections 8(B)(4)(A), 8(B)(4)(B), and 8(B)(4)(C) of the National Labor Relations Act as Amended, Hereinafter Called the Act, but Not on Charges of Violation of Section 8(B)(4)(D).

The trial judge was manifestly following the theory that his granting or withholding of the decree sought by petitioner depended on a finding that "petitioner had good cause to believe" rather than the application of "traditional equity criteria" and so considered this point in his opinion at some length, even to setting forth the whole of Section 10-1 [Tr. 92, 93].

While we know of no judicial interpretation of the last sentence of that section, we hold it to be self-evident that by the use of the words "In situations where such relief is appropriate" the last sentence, relating to charges with respect to 8(B)(4)(D), contemplated something different from the finding by the regional officer mentioned before. If only that finding had been contemplated it would have been easy to enumerate 8(B)(4)(D) along with the other three sections. It seems obvious to us that "in situations where such relief is appropriate" means that injunction will issue on a showing by a preponderance of the evidence, that the violative acts have occurred and will continue unless enjoined, that they affect commerce within the meaning of Section 2, Subsections 6 and 7, and that there is no adequate remedy at law and that great and irreparable injury is threatened.

V.

**The Trial Court Had No Jurisdiction to Entertain a
Petition for Injunction Within the Time Allowed
for Voluntary Compliance With the Decision of
the Board Under 10-K of the Act.**

As will be seen, 10-K contemplates voluntary settlement between the contending parties to a jurisdictional dispute and interposes the 10-K Decision and Determination between the charge and the complaint under 8(B)(4)(D).

The Petition herein was filed May 3, 1949 [Tr. 13], the 10-K decision of the Board is marked "Signed at Washington, D. C., this 11th day of May, 1949" [Tr. 241] and "Admitted May 16, 1949" and Finding of Fact No. 8, which is responsive to no allegation, recites that the decision was served on respondents therein (appellants here) on May 13, 1949. The decision gives 10 days for voluntary compliance, but under the Rule to Show Cause the Petition was before the trial court on May 16, 1949 [Tr. 38, 39].

Ordinarily we would not feel able to argue that the decision mooted the petition and that its ten day provision made the petition and hearing thereunder premature, as a showing that the point was raised in the trial court would be de hors the record, which contains only the documents, there being no oral evidence. However, the appellee has added the opinion of the trial court to this record and its recitals show the point was raised there [Tr. 95, 96].

While it is true that the court waited until May 26, 1949, shortly after the ten days to indicate its decision, we argue it was error for the court to entertain the petition after the decision and within the ten-day period provided by the decision.

VI.

The Injunction Appealed From Was Issued to Restrain a Strike by Appellants Against the Machinists and Westinghouse for Violation of Sections 8-a-1, 8-a-3, 8-b-1, and 8-b-2 of the Act Constituting Unfair Labor Practices Under the Act, Which Excluded Members of Appellants From Employment; on the Evidence the Work Stoppage Is the Result of the Illegal Closed Shop Contract; an Unfair Labor Practice Strike Is Protected Union Activity.

Section 8(B)(4)(D) reaches into the mind of the union member and commands him what not to think. When injunctions issue thereunder he thinks at his peril and may be sent to jail for what someone thinks he thinks.

A union member in walking the picket line, talking to his friends, or at work on his job must be careful to think proper thoughts, particularly if the injunction is under 8(B)(4)(D).

That the danger to the exercise of the rights intended to be secured to the individual by constitutional guarantees is much greater under 8(B)(4)(D) than under 8(B)(4)(A) may be seen by comparison of the injunction in this case under 8(B)(4)(D), the jurisdictional strike section, with that in the *Sealright* case, *supra*, under 8(B)(4)(A), the Secondary Boycott Section.

That injunction arose out of a situation in which the employees of Sealright, in pursuance of their dispute with their employer, followed his products to places where his customers and others were handling the products, and picketed the product at those places. The highly artificial contention that such conduct "constitutes the conscription

of neutrals" (*Carpenters Union v. Ritter's Cafe*, 315 U. S. at 728), is disposed of directly in the realistic reasoning of the California case of *In re Fortenbury*, 16 Cal. 2d 311.

This logical and theretofore lawful conduct having been proscribed in 1947 by 8(B)(4)(A), the court in the *Sealright* case issued the following injunction, following the language of the Act, forbidding the unionists from:

"Engaging in, or inducing or encouraging, the employees of any employer, by picketing, orders, force, threats, or promises of benefit, ~~or by permitting any such to remain in effect,~~ or by any other like or related acts or conduct to engage in, a strike or a concerted refusal . . . where an object thereof is forcing any employer or other person to cease . . ."

The injunction in this case, in which there was withdrawal from work but no picketing, in the language of 8(B)(4)(D) essentially forbids the unionists:

"Engaging in, inducing or encouraging, the employees of A, B, C, or any other employers, to engage in a strike or concerted refusal . . . to use, manufacture, process, transport, or otherwise handle or work on any goods . . . of A, B, C, or any other employer, where an object thereof is to force or require A, B, or C to assign the work . . ."

Now it will be seen that under the *Sealright* injunction the striking *Sealright* employee has a much better chance of keeping out of jail than has the striking employee affected by the injunction here.

In the *Sealright* case the proscribed acts are enumerated, vaguely, but still there is some suggestion of guidance: "by picketing, orders, force, threats, promises, or by any other like or related acts or conduct." Thus the

Sealright employee has some guide as to what constitutes contempt, particularly if he is able to understand what is meant by the reference to "like or related acts or conduct." He is further entitled to the comforting thought, probably erroneous, that he is less apt to be in contempt at the plant of his employer than if at the plant of a customer, supplier, or carrier of his employer.

Our exemplar employee affected by the present injunction has no guide whatever for his conduct. Anything he may do, say, write or think which has the effect of encouraging *anybody* who works for *anybody* who has relations with his employer to strike or do anything less than produce 100% in teamwork—is *contempt*. And, of course, it is contempt for our exemplar employee to himself strike, remain on strike, or stop producing 100% in teamwork.

Notice the way the provisions of 8-C are written into the Sealright injunction. Instead of being written in to qualify the rest of the injunction, they are added as additional liabilities. In the present injunction the court declined even to mention the 8-C provisions, although we strongly stressed, and repeated in our objections to the decree [Tr. 111 and 112] that we were entitled to have an injunction in which peaceful labor activities in a dispute concerning wages, hours, and conditions of labor, were protected unless containing threats of reprisal, or force, or promises of benefit. In this action the court probably followed the *United Brotherhood of Carpenters v. Sperry* case, 170 F. 2d at 869, and the discussion of this court in the *Sealright* case, *supra*.

The one qualification in the injunction here is that the acts must have for a purpose the inducing of the jurisdictional objective. This is the subjective element which is

the essential element of the jurisdictional strike section of this act as well as the Secondary Boycott section of this Act and the so-called Hot Cargo Act struck down by the Supreme Court of the State of California in *In re Blaney*, 30 Cal. 2d 643. It is characteristic of all of them that the prohibitions of each "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." (*In re Blaney, supra.*)

Since the subjective state of the unions at whom the petition was directed is pivotal, they took great care to show the trial court that their motive was not violation of the provisions of 8(B)(4)(D) but the breaking up of the monopolistic operation of an illegal closed shop contract between the charging union, the Machinists, and Westinghouse, which ousted their members of employment opportunities. This showing was made not only in the Return, Paragraph IX [Tr. 44 *et seq.*], but by voluminous evidence brought in by affidavit and starting at Transcript page 124. To our mind the evidence as to the purpose is overwhelming against the violation of 8(B)(4)(D) as an objective, and the presumption of lawful conduct is sufficient to guard against the assumption of a mixed objective. Since all acts of the American Federation of Labor unions are consistent with a lawful objective the presumption is against there being an additional unlawful objective.

The direction of the important decisions, *i.e.*, the National Labor Relations Board decisions, is with us on this

important point. After all, the action of the Board on a complaint is conclusive on the question as to whether the charge should have been entertained, *Hicks v. N. L. R. B. and Friedman-Marks*, 100 F. 2d 804.

There is no use in issuing Taft-Hartley injunctions on the "tainted purpose" theory if the National Labor Relations Board is going to disavow them by dismissing the complaints, as has been happening in the Twenty-first Region.

See:

Emison, dba Santa Ana Lumber Co., 21-CC-60, 87 N. L. R. B., No. 135, C. C. H., par. 9,482 (the appeal to this court from the Decree of Injunction was dismissed after the N. L. R. B. dismissed the complaint);

Di Georgio Wine Co., 87 N. L. R. B. No. 125, C. C. H., par. 9,477 (as to Teamsters Union).'

At the time of the entry of the decree in the trial court June 10, 1949, not even the *Pure Oil* case, June 17, 1949, had been decided, holding that picketing and publication in a primary dispute which had the incidental and obvious effect of inducing a secondary boycott, was not violation of 8(B)(4)(A). (*Pure Oil Co.*, 84 N. L. R. B. No. 38, C. C. H., Par. 9000.)

Since then we are powerfully reinforced by the *Emison-Santa Ana Lumber* case, *supra*, and *Grauman Co. and Denver B. T. C.*, 87 N. L. R. B. No. 136, C. C. H., Par. 9479, decided the same day, December 16, 1949.

There is now, finally, an 8(B)(4)(D) case squarely in point, *Ship Scaling Contractors Association and Local 961 (AFL)*, 87 N. L. R. B. No. 14, 20 C. D. 7, November 18, 1949, C. C. H., Par. 9415. This case involved a dispute over work assignments between a C. I. O. and an A. F. of L. union, but there was also an issue, and picketing, over a difference in wage scales. The National Labor Relations Board dismissed the notice of 10-K hearing on this showing.

It is also interesting to note that the *Rabouin* case (*Conway Express*) on which the Regional attorney relied heavily in the trial court in the *Sealright* case, U. S. District Court, Northern District of New York, Civil 3084, 75 Fed. Supp. 414, has been shot out from under him by the Board in an important divided purpose case, *Henry V. Rabouin, dba Conway's Express and International Brotherhood of Teamsters Local 294*, 87 N. L. R. B. No. 130, December 16, 1949, C. C. H., Par. 9475.

VII.

The Injunction Appealed From Is Couched in the Language of the Act, Is so Vague and Indefinite That It Is Impossible to Ascertain Therefrom What Conduct Is Allowed and What Conduct Is Forbidden, and Is Contrary to Rule 65(d).

This point is argued under VI. See the following cases dealing generally with the ascertainable standard requirement:

Lanzetta v. New Jersey, 301 U. S. 451, 59 S. Ct. 618, 81 L. Ed. 888;

In re Blaney, supra;

In re Bell, 19 Cal. 2d 495.

VIII.

The Injunction Appealed From Is Broader Than the Dispute Involved and Decided by the Board, Unnecessarily Restricts the Rights of the Union Members, Compels Them to Work Against Their Desires and Prohibits Their Withholding Their Services.

The plain provisions of 10-K make the determination therein a necessary prerequisite to any complaint that may be filed. We think that no amended charge filed too late to be considered at a 10-K hearing will support a complaint, and that it is impossible for a regional officer to find a complaint should issue on such a charge, the imprimatur of 10-K hearing being lacking and impossible. The Board refused to consider the second amended charge [Tr. 231—see footnote] which is the basis of the petition herein, Paragraphs 7, 8, 9 [Tr. 4, 5], because it was filed after the 10-K hearing.

Our conclusion is that if Section 10-K means what it says then the petition's allegations in the above mentioned paragraphs as to reasonable cause to issue complaint are palpably false and that petitioner has brought before the court evidence of acts, in support of the second amended charge, occurring subsequent to the 10-K hearing. Such are the allegations of subparagraphs (i) and (j) of paragraph of the petition and of the proofs thereunder [Tr. 9, 10, 30, 31, 32].

The court found on the second amended charge [Finding 6, Tr. 114] and we fully set forth our objection [Tr. 105] based on the filing of this charge after the 10-K hearing and Board Rules, 203.74-203.77, inclusive.

The court found in the Decision [Finding 8, Tr. 115] and we fully objected [Tr. 1-7] because it was a conclusion and not a finding of fact and fails to show that the Decision is not on the record amended charge. The court found on commerce [Finding 9, a, b, c, and d, Tr. 115-116] to which we objected [Tr. 107] as being against the evidence. The court found on the overt acts [Finding 9-e, Tr. 117] to which we objected as unsupported by the evidence, being a conclusion of law, and lacking sufficient specification [Tr. 107, 108]. The court found that respondents had failed to comply with the Decision [Finding 9-f, Tr. 118] to which we objected [Tr. 108] on the ground that there was no evidence before the court to support the finding. The court found on violation of 8(B)(4)(D), commerce, and continuing injury [Finding 9-g, h, i, Tr. 118] to which we objected [Tr. 108] that these findings had no support in the evidence.

We objected to conclusions of law in favor of petitioner on Commerce (1), Jurisdiction (4), Overt acts in violation of 8(B)(4)(D) affecting commerce under Section 2, Subd. 627 (5), the Constitutionality of 8(B)(4)(D) (6), and to the finding of injunction against respondents (7); and we objected to the Decree as well as (7) above as being contrary to Rule 65-D, because broader than the dispute involved and because denying to respondents the protection of 8-C of the Act.

The application of Section 10-1 in the manner in which the prohibition against striking and inducing work refusals is written into the injunction, is a violation of the inhibitions of the Thirteenth Amendment to the United States Constitution. See: *Podlock v. Williams*, 322 U. S. 4, 64 S. Ct. 792, 88 L. Ed. 1095.

IX.

The Act Does Not Confer Jurisdiction on the Board to Hear and Determine Matters Such as Are Presented in This Case Arising Out of a Building Enterprise Purely Local in Nature and Not Contributing to the Flow of Interstate Commerce, and Hence the District Court Had No Jurisdiction to Entertain the Petition.

On this point see *Industrial Association v. United States*, 268 U. S. 64. In view of our proposition in III above that the trial court accepted an unjustified assumption instead of proof on commerce, and the uncontroverted allegations of our return that the alleged acts affected only a local labor situation in building construction. [Par. XII, Tr. 49.]

X.

The Sixth Finding of Fact Based on the Second Amended Charge Erroneously Supports the Injunction With Matters Not Considered by the Board or on Which There Has Been a 10-K Hearing.

This point is made on the objection to the Findings treated under Point VIII, pointing out that this finding on Paragraphs 7, 8 and 9 of the Petition goes to matters not considered at the 10-K hearing and brought up after the 10-K hearing.

XI.

The Acts and Conduct of the Respondents Below Justifying the Issuance of the Injunction Are Not Found or Specified in Reasonable Detail.

We believe that no discussion on this point is required, since the findings to which objection was made, speak for themselves.

XII.

The Injunction Is Not Limited to Proper Pendente Lite Relief But Finally Determines the Issues Presented by the Charges Against the Unions and Grants Full and Final Relief Against Them Without Trial.

As pointed out in the statement of the case, the effect of the injunction, which by its terms runs only to the Redondo Beach power plant job, of course exceeds the time required for the job. The effect of the injunction is, very apparently, to settle jurisdiction on the job by conferring the benefits of an illegal closed shop contract on the Machinists and Westinghouse.

XIII.

The Injunction Erroneously Omits to Preserve to the Unions the Rights Guaranteed by Section 8-C of the Act in Failing to Exclude From Its Prohibitions Acts Which Do Not Involve Threats or Reprisal or Promises of Benefit.

This point has been covered under Point VI.

Respectfully submitted,

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Attorney for Appellants.

**In the United States Court of Appeals
for the Ninth Circuit**

LOS ANGELES BUILDING AND CONSTRUCTION TRADES
COUNCIL; AND ITS AGENT LLOYD A. MASHBURN;
MILLWRIGHT AND MACHINERY ERECTORS, LOCAL 1607,
OF THE UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, A. F. L., AND ITS AGENT
HERMAN BARBAGLIA, APPELLANTS

v.

HOWARD F. LEBARON, REGIONAL DIRECTOR OF THE
TWENTY-FIRST REGION OF THE NATIONAL LABOR
RELATIONS BOARD, FOR AND ON BEHALF OF THE
NATIONAL LABOR RELATIONS BOARD, APPELLEE

ON APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN DISTRICT OF CALI-
FORNIA, CENTRAL DIVISION

BRIEF FOR APPELLEE

FILED

APR 10 1950

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In the United States Court of Appeals for the Ninth Circuit

No. 12378

LOS ANGELES BUILDING AND CONSTRUCTION TRADES
COUNCIL, AND ITS AGENT LLOYD A. MASHBURN;
MILLWRIGHT AND MACHINERY ERECTORS, LOCAL 1607,
OF THE UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, A. F. L., AND ITS AGENT
HERMAN BARBAGLIA, APPELLANTS

v.

HOWARD F. LeBARON, REGIONAL DIRECTOR OF THE
TWENTY-FIRST REGION OF THE NATIONAL LABOR
RELATIONS BOARD, FOR AND ON BEHALF OF THE
NATIONAL LABOR RELATIONS BOARD, APPELLEE

*ON APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE SOUTHERN DISTRICT OF CALI-
FORNIA, CENTRAL DIVISION*

BRIEF FOR APPELLEE

JURISDICTION

This is an appeal from an order of the United States District Court for the Southern District of California granting a petition filed on behalf of the National Labor Relations Board, herein called the Board, by Howard F. LeBaron, the Regional Director for the Twenty-first Region of the Board, pursuant to Section 10 (1) of the National Labor Relations

Act, as amended (61 Stat. 136; 29 U. S. C., Supp. II, Sec. 141 *et seq.*), herein called the Act. The order of the district court, which was entered on June 10, 1949, enjoins appellants from engaging in certain unfair labor practices as defined by Section 8 (b) (4) (D) of the Act, pending final adjudication of the matter by the Board (R. 121-123).¹ Notice of appeal to this Court was filed July 8, 1949 (R. 123-124). The opinion of the court below (R. 83-104) is reported at 84 F. Supp. 629.

Appellants Los Angeles Building and Construction Trades Council and Millwright and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A. F. of L., herein called Council and Millwrights, respectively, are labor organizations within the meaning of the Act, Council being comprised of 18 labor organizations, including Millwrights, engaged in the building trades industry, and both have their principal offices within the Southern District of California (R. 40, 51). Appellants Lloyd A. Mashburn and Herman Barbaglia are agents, respectively, of Council and Millwrights within the meaning of the Act (R. 40-41, 51, 218). Appellants Council and Mashburn are engaged within the Southern District of California in promoting and protecting the interests of Council's constituent unions and employee members. Appellants Millwrights and Barbaglia are engaged within the Southern District of California in promoting and protecting the interests of the employee members of Millwrights (*ibid.*).

¹ References to the printed transcript of record are designated "R."

The unfair labor practices charged were committed within the Southern District of California (R. 116-119).

As shown by the petition (R. 2-3), the jurisdiction of the court below was invoked under the provisions of Section 10 (l) of the Act. The jurisdiction of this Court is invoked under Sections 128 and 129 of the Judicial Code (28 U. S. C. 225 and 227).

STATUTE INVOLVED

The statutory provisions primarily involved are Sections 8 (b) (4) (D) and 10 (k) and (l) of the Act. These provisions are set forth hereinafter in the brief (*infra*, pp. 4, 15-16, 18-19).

STATEMENT OF THE CASE

The petition in the court below alleged that Local Lodge 1235 of the International Association of Machinists, hereinafter called Machinists,² pursuant to the provisions of the Act, on or about April 15, 1949, filed with the Board a second amended charge, to a charge filed on February 2, 1949, and amended March 8, 1949, alleging that appellants in violation of Section 8 (b) (4) (D) of the Act had engaged in and were engaging in strike action with an object of forcing or requiring Westinghouse Electric Corporation and/or Stone and Webster Engineering Corporation to assign work to members of Millwrights

² The International Association of Machinists is an independent labor organization and its above-named local is not affiliated with Council. Machinists is a labor organization within the meaning of the Act and, is engaged in promoting and protecting the interests of its employee members in the Southern District of California (R. 7, 43-44).

which had been assigned to members of Machinists, and that the alleged unfair labor practices were affecting commerce within the meaning of Section 2 (6) and (7) of the Act. The petition further alleged that the charge and amended charges were referred to appellee for investigation; and that, after a preliminary investigation, appellee had reasonable cause to believe that the second amended charge was true and that a Board complaint should issue thereon (R. 2-11). The petition prayed for an injunction enjoining the unfair labor practices pending their final adjudication by the Board (R. 11-13). Appellants answered denying the jurisdiction of the Board and the Court over the dispute, or the commission of unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act, and claiming that Section 8 (b) (4) (D) of the Act, in any event, violates the First, Fifth, and Thirteenth Amendments of the Constitution of the United States (R. 39-50).

The court below, upon a hearing and due consideration of the petition, return, points and authorities, documentary evidence, affidavits and oral argument of counsel, and upon appellants' failure to comply with the Decision and Determination of Dispute issued by the Board under Section 10 (k) of the Act (see R. 95-96, 118, 125, 229 et seq.),³

³ Section 10 (k) provides that:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satis-

granted the relief prayed for in the petition (R. 81-104, 112-123).

The evidence before the court below showed the following facts:

In July 1946, Southern California Edison Company, herein called Edison, began the construction of a new steam turbine electric power generating station at Redondo Beach, California, herein called the Redondo station (R. 27, 233-234). Stone and Webster Engineering Corporation, herein called Stone and Webster, was the general contractor (*ibid.*). Some time prior to January 1949, Edison contracted with Westinghouse Electric Corporation, herein called Westinghouse, for three steam turbine generators to be furnished and installed by Westinghouse at the Redondo station (R. 29-30, 234).

Westinghouse is engaged in the manufacture, sale and installation of electrical supplies and equipment. The three generators, valued at approximately \$4,800,000, which Westinghouse agreed to install for Edison at the Redondo station, were manufactured at Westinghouse's East Pittsburgh and Lester, Pennsylvania, plants and shipped to the Redondo station. In addition to the plants at East Pittsburgh and Lester, Westinghouse has plants elsewhere in the United States (R. 6-8, 28-30, 55, 232-234). During the year 1948, the Westinghouse plant at East Pitts-

factory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

burgh, where generators are manufactured, and the one at Lester, where steam turbines are made, each used raw materials valued at in excess of \$1,000,000, of which approximately 50 percent originated outside the State of Pennsylvania. During the same period, the manufactured products sold from each of these plants exceeded \$1,000,000; the out-of-state sales from the East Pittsburgh plant approximated 90 percent of all sales of the plant and the out-of-state sales from the Lester plant approximated 50 percent of all sales of that plant (R. 29, 232-233).

Edison is a public utility engaged in furnishing electrical energy and services to the Los Angeles and Southern California area. Thirty-nine percent of its output of electrical energy goes to instrumentalities of interstate commerce and concerns engaged in interstate commerce, such as aircraft manufacturers, oil refineries, rubber companies, and steel plants. During the year 1948, Edison purchased raw materials at a cost exceeding \$3,400,000, of which $66\frac{2}{3}$ percent had their origin outside the State of California. During the same period, approximately $25\frac{1}{2}$ percent of the total power utilized by Edison came from outside the state (R. 5-6, 55, 233).

Stone and Webster is a general contractor engaged mainly in industrial and commercial construction work, such as the construction of steam generator plants, transmission lines, manufacturing plants and paper mills. Its construction activities extend to every state in the United States and to many foreign countries. At the end of the year 1948, the construction it then had in progress had an estimated

completed value of one-third billion dollars (R. 27).

The total cost of constructing and equipping the Redondo station is estimated at in excess of \$38,000,000. The estimated cost of equipment is \$18,500,000. Of this amount, \$12,700,000 is for equipment to be transported from outside the State of California directly to the job site. In May 1949, when the petition for injunctive relief was filed, the units in operation at the Redondo station, which was 75 per cent completed, furnished approximately 15 percent of Edison's total output of electrical energy (R. 27).

The employees on the Redondo station construction were, with one exception, members of unions affiliated with Council (R. 27-28, 234-235).⁴ Westinghouse and General Electric Company, the other manufacturer under contract to furnish and install steam-turbine generators at the Redondo station, in their installation work employed, among others, members of Machinists, an unaffiliated union (R. 126-130, 137-138, 155-157, 164-169, 183-185, 196-197, 234-235). A short time before the installation of the second Westinghouse generator was scheduled to commence, representatives of Council and Millwrights attempted to persuade Stone and Webster to have Westinghouse replace the members of Machinists employed by Westinghouse in the installation work with members of Millwrights, a Council affiliate. Stone and Webster disclaimed control over the employment of the Westinghouse generator-installation men, saying that was

⁴ Stone and Webster had approximately 550 employees on the job and other contractors had approximately 100 employees on the site (R. 27-28, 235-237).

a Westinghouse responsibility exclusively (R. 219-221, 234-235, 244-250).

On January 31, 1949, Westinghouse began the installation of its second generator on the project (R. 193). Two members of Machinists, among others, were employed in the installation work (R. 166, 185, 235). At the commencement of the job, appellant Barbaglia warned the two Machinists that if they started the job he would "have to take job action" (R. 35) and asked Scanlon, a Westinghouse supervisor, to remove them until the dispute could be straightened out (R. 206-207). Scanlon refused to do so (R. 208).

On the following day, February 1, appellant Washburn approached Budge, another supervisor for Westinghouse, to replace the two Machinists with Millwrights (R. 213). When Budge refused, Washburn also announced that he would "take action" (*ibid.*). On the same day, appellant Barbaglia also informed Supervisor Scanlon that he would "stop the job" unless the Machinists were replaced with Millwrights (R. 160-163).

On February 2, appellant Council, admittedly (see R. 45), called a general strike of all the building trades employees on the Redondo station project (see also R. 32-33, 35-36, 162, 195, 235). As the court below found, the purpose of the strike was to require Stone and Webster and Westinghouse to assign the generator installation work to members of Millwrights rather than to members of Machinists employed by Westinghouse (R. 86, 117). All of the approximately 650 employees, except the two Machinists em-

ployed by Westinghouse, walked off the job, and, except for that of the latter, all work was suspended on the project (R. 36, 195, 235). On February 10, Edison requested Westinghouse to suspend its installation work until the dispute between Millwrights and Machinists was resolved (R. 32-34, 79-81). When Westinghouse acquiesced in the request and withdrew its Machinists, the other employees, members of unions affiliated with Council, returned to work on the project (R. 34, 235).

However, at the time of the hearing below, no further installation work had been done on the Westinghouse generator (see R. 235). Moreover, on April 11, 1949, Council pulled the 6 riggers employed by Westinghouse⁵ to unload its third generator destined for installation on the project off the job (R. 47, 30-32). As the court below found, this action was part of the continuing pressure being exerted by appellants against Westinghouse to force the assignment of the generator installation work to members of Millwrights rather than to members of Machinists (R. 86, 117).

On May 11, 1949, the Board handed down its Decision and Determination of Dispute in the Section 10 (k) proceeding (*see supra*, p. 4), in which it held that appellants were not lawfully entitled to force or require Westinghouse to assign the generator installation work at the Redondo station to members of Millwrights rather than to employees of Westinghouse who are members of Machinists (R. 241). The Board's decision and determination was received in

⁵ Members of Local No. 433, International Association of Bridge, Structural and Ornamental Iron Workers, affiliated with Council.

evidence at the hearing in the court below (see R. 228 *et seq.*).

Upon the foregoing facts, the court below found there was reasonable cause to believe that appellants had engaged in unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act, affecting commerce within the meaning of Section 2 (6) and (7) of the Act (R. 96-97, 112-119). The court below also concluded that Section 8 (b) (4) (D) was not repugnant to the First, Fifth and Thirteenth Amendments to the Constitution of the United States (R. 89-91, 119), and that injunctive relief in the premises was appropriate under Section 10 (l) of the Act (R. 91-100, 119-120). Accordingly, it rejected appellants' defenses and, after appellants failed to comply with the Board's Section 10 (k) decision and determination, issued an order enjoining appellants from (R. 121-123):

Engaging in, or inducing or encouraging the employees of Stone and Webster, Westinghouse, or any other employers, to engage in a strike or concerted refusal in the course of their employment, to use, manufacture, process, transport or otherwise handle or work on any goods, articles or materials or commodities belonging to or utilized by Stone and Webster, Westinghouse or any other employer engaged on the construction project for Edison at Redondo Beach, California, or to perform services for Stone and Webster, Westinghouse, or any other employer on said project, where an object thereof is to force or require Westinghouse and/or Stone and Webster to assign the work of installing steam turbine generators

to members of respondent Millwrights rather than to employees of Westinghouse who are now members of Machinists, or any other labor organization, unless respondent Millwrights is certified by the Board as the bargaining representative for the employees performing such work.

SUMMARY OF ARGUMENT

The instant case was initiated pursuant to Section 10 (1) of the Act. Section 10 (1) empowers the district courts of the United States to grant, upon application of the Board, such interlocutory injunctive relief as is just and proper pending determination by the Board of unfair labor practice charges filed under Section 8 (b) (4) of the Act, where there is reasonable cause to believe that such unfair labor practices are being committed. The court below properly found that there was reasonable cause to believe that appellants by orders, directions, and instructions, in violation of Section 8 (b) (4) (D) of the Act, induced and encouraged the employees of Stone and Webster, Westinghouse, and other employers to engage in a strike or a concerted refusal to transport or handle or work on Westinghouse products or to perform services for their employers, an object thereof being to compel Westinghouse to assign the installation of steam turbine generators at the Redondo station to members of Millwrights rather than to members of Machinists.

The court below properly found that there was reasonable cause to believe that appellants' conduct charged as violative of the Act and directed against the business operations of Edison, Stone and Webster,

and Westinghouse, affected commerce within the meaning of Section 2 (6) and (7) of the Act.

Neither Section 8 (b) (4) (D) of the Act, nor the order of the court below enjoining such conduct on the part of appellants, violates the constitutional guaranty against involuntary servitude. The Act and the order merely prohibit labor organizations or their agents from engaging in strikes or inciting employees to engage in strikes or concerted refusals to perform services for the stated object. Neither the Act nor the order of the court below requires employees to continue working against their will.

The Act, insofar as it enjoins picketing where used to induce or encourage employees to engage in a strike or concerted refusal to perform services for the objects enumerated therein, does not violate the constitutional guaranty of free speech but represents a valid exercise of the Congressional power over commerce. Congress may, in order to narrow the area of industrial conflict and protect the public interest in the free flow of commerce, illegalize picketing where it is utilized to conscript employees in order to bring pressure to bear upon an employer to assign work to members of one union rather than to members of another union. Congress may prohibit conduct, including picketing for purposes it finds inimical to the public welfare without transgressing constitutional limitations.

Section 8 (b) (4) (D) of the Act does not violate the Fifth Amendment of the Constitution because it curtails appellants' liberty to exert pressure on employers through employees to compel the contracting

of work to their members rather than to members of another group. Congress may regulate or prohibit labor practices which it finds injurious to the public welfare.

Section 10 (l) of the Act applies to charges filed under Section 8 (b) (4) (D) of the Act, and the district court did not prematurely entertain the injunction proceeding or consider matters not properly before it. Relief under Section 10 (l) of the Act is supplementary and not subordinate to the procedures under Section 10 (k) of the Act and proceedings under both sections may be processed concurrently. Conduct engaged in after a Section 10 (k) proceeding and relevant and material to the dispute involved is admissible in support of a complaint under Section 8 (b) (4) (D) without a further Section 10 (k) hearing.

The injunction order of the district court cannot be successfully challenged on the grounds that it is vague and indefinite or that it fails to embody the provisions of Section 8 (c) of the Act. The order couched in statutory language furnishes an adequate guide as to what conduct is proscribed and is as specific as the nature of the problem permits. The protection which Section 8 (c) of the Act extends to the expression of views, argument, or opinion which contain no threat of reprisal or force or promise of benefit does not require modification of the order entered by the district court. The provisions of Section 8 (c) of the Act do not exempt from prohibition the inducement or encouragement to en-

gage in a strike or a concerted refusal to work for the objects proscribed by Section 8 (b) (4) of the Act.

ARGUMENT

Preliminary statement: The statutory scheme pursuant to which the present proceedings were initiated in the court below

The proceedings before the court below were similar to those reviewed by this Court in the *Printing Specialties* case.⁶ As in that case, these proceedings, initiated pursuant to the provisions of Section 10 (1) of the Act, resulted in the issuance of a temporary injunction by the lower court restraining the unfair labor practices charged pending their final determination by the Board.

The Act empowers the Board, upon the filing of appropriate charges, to issue, hear and determine complaints that employers or labor organizations have engaged in unfair labor practices within the meaning of the Act (Section 10 (a), (b) and (c) of the Act). In addition, in respect to charges under Section 8 (b) (4) (D) of the Act, the unfair labor practice section involved here, the Board is empowered and directed to hear and determine the dispute out of which the unfair labor practice arose (Section 10 (k) of the Act; see *supra*, p. 4). Proceedings of this character are necessarily protracted and time consuming. Congress believed that certain unfair labor practices committed by labor organizations gave, or tended to give, rise to such serious and unjustifiable interrup-

⁶ *Printing Specialties and Paper Converter's Union, Local 388, A.F. L. v. LeBaron*, 171 F. 2d 331 (C. A. 9).

tions to commerce that their continuation, pending adjudication by the Board, would result in irreparable injury to the purposes of the Act.⁷ Accordingly, in order to prevent such a frustration of the statutory purpose, Congress provided in Section 10 (l) of the Act that—

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges

⁷ S. Rep. No. 105, 80th Cong., 1st Sess., pp. 8, 27.

that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. *In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).* [Emphasis added.]

The injunctive relief contemplated in Section 10 (1) is interlocutory to the final determination of the matter by the Board and is limited to such time as may expire before the Board issues its final order with respect to the unfair labor practices charged. As in the case of traditional equity practice with respect to interlocutory relief,⁸ the prerequisite to the

⁸ *Bowles v. Montgomery Ward & Co.*, 143 F. 2d 38, 42 (C. A. 7) ; *Colorado Eastern R. Co. v. Chicago, etc., Ry. Co.*, 141 Fed. 898,

granting of the relief contemplated by Section 10 (1) of the Act is a finding by the district court that there is reasonable cause to believe that a violation of the Act, as charged, has been committed and that equitable relief would be "just and proper." The court is not called upon to decide, as appellants suggest, by a preponderance of the evidence (Br., pp. 22, 25), whether in fact the charges are true or whether in fact a violation of the Act affecting commerce has been committed. The ultimate determination of the truth of the charges and the existence of a violation of the Act affecting commerce is reserved exclusively to the Board, subject to review by the circuit courts of appeals pursuant to Section 10 (e) and (f) of the Act.⁹

901 (C. A. 8); *Sinclair Refining Co. v. Midland Oil Co.*, 55 F. 2d 42, 45 (C. A. 4); *Northwestern Stevedoring Co. v. Marshall*, 41 F. 2d 28, 29 (C. A. 9); *City of Louisville v. Louisville Home Telephone Co.*, 279 Fed. 949, 956 (C. A. 6); *United States v. Parrott*, 27 Fed. Cas. 417, 430, 435 (C. C. N. D. Calif.); *Eastern Texas R. Co. v. Railroad Commission*, 242 Fed. 300, 305 (D. C. W. D. Tex.).

⁹ *Printing Specialties and Paper Converters Union, Local 388, A. F. L. v. LeBaron*, 171 F. 2d 331 (C. A. 9); *Building and Construction Trades Council v. LeBaron* (C. A. 9), decided June 30, 1949, 24 L. R. R. M. 2367; *United Brotherhood of Carpenters and Joiners of America v. Sperry*, 170 F. 2d 863 (C. A. 10); *Douds v. Local 1250, Retail Wholesale Dept. Store Union*, 170 F. 2d 695 (C. A. 2); *Shore v. Building and Construction Trades Council*, 173 F. 2d 678 (C. A. 3); *LeBaron v. Kern County Farm Labor Union*, 80 F. Supp. 151, 153, 158 (D. C. S. D. Calif.); *Brown v. Roofers and Waterproofers Union, Local No. 40*, 86 F. Supp. 50 (D. C. N. D. Calif.); *Douds v. Teamsters Union, Local 294*, 75 F. Supp. 414 (D. C. N. D. N. Y.); *Evans v. International Typographical Union*, 76 F. Supp. 881 (D. C. S. D. Ind.); *Styles v. Local 74, United Brotherhood of Carpenters*, 74 F. Supp. 499 (D. C. E. D. Tenn.); *Douds v. Wine, Liquor & Distillery Workers Union, Local No. 1*, 75 F. Supp. 447 (D. C. S. D. N. Y.).

The district court in this case did not, as appellants argue (Br., pp. 23–27), abdicate to appellee, the Board’s Regional Director, its duty to find reasonable belief of a violation of the Act affecting commerce, any more than it did in the *Printing Specialties* case (*supra*, p. 14). On the contrary, the lower court makes plain, both in its opinion (R. 85, 91–93, 96–99) and its findings of fact and conclusions of law (R. 115, 119), its independent conclusion within the statutory scheme that the belief that a violation of the Act as charged had occurred was reasonable. Nor did the court err, as appellants claim (Br., pp. 24–25), in citing the Board’s Section 10 (k) decision and determination (see *supra*, p. 9) as confirmation of the existence of reasonable cause to believe the truth of the unfair labor practice charge (see R. 95). It is clear that under the statutory scheme, the Board’s decision determined the illegality of appellants’ claim to the generator installation work, the work in dispute (see R. 240–241).

I

The district court properly found that there was reasonable cause to believe that appellants have, as charged, engaged in unfair labor practices in violation of Section 8 (b) (4) (D) of the Act

Section 8 (b) (4) (D) of the Act provides that:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process,

transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. * * *

The substantially uncontradicted evidence summarized above fully supports the holding of the court below (R. 117) that there is, and appellee had, reasonable cause to believe that:

(e) Respondents on or about February 2, 1949, and at all times since that date, have, by orders, directions, and instructions, induced and encouraged employees of Stone and Webster, Westinghouse and other employers engaged at the Redondo Beach station to engage in a strike or concerted refusal in the course of their employment to transport or otherwise handle or work on Westinghouse products or to perform services for their employers in connection with the Redondo Beach project, an object thereof being to force or require Westinghouse to assign the work of installing the steam turbine generators at the Redondo Beach station to members of respondent Millwrights rather than to the employees of Westinghouse who are now members of the Machinists.

It is clear, we submit, that appellants' conduct, summarized above, falls squarely within the proscription of Section 8 (b) (4) (D) of the Act and constitutes an unfair labor practice within the meaning of that section. Plainly, appellants did, in the language of Section 8 (b) (4) (D) of the Act—

* * * engage in, or * * * induce or encourage [by orders, directions, and instructions] the employees of any employer [Stone and Webster, Westinghouse and other contractors on the Redondo station project] to engage in, a strike or concerted refusal in the course of their employment to * * * transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services [for Stone and Webster, Westinghouse and other contractors on the Redondo station], where an object thereof is: * * * (D) forcing or requiring any employer [Westinghouse] to assign particular work [the installation of steam turbine generators at the Redondo station] to employees in a particular labor organization [members of Millwrights] * * * rather than to employees in another labor organization [members of Machinists] unless such employer [Westinghouse] is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

Appellants' conduct would be lawful only were Westinghouse failing to conform to an order or certification of the Board determining Millwrights to be the bargaining representative for the employees of Westinghouse performing the work in dispute. Appellants make no suggestion that such is the fact.

Although appellants at two places in their brief (see pp. 6, 13-14) admit, as they conceded at the Section 10 (k) hearing before the Board (see R. 245-246, 248-249) and as the facts indisputably show (see R. 30-36, 79-81, 160-163, 194-195, 206-208, 213), that the work stoppages herein were called to force the assignment to Millwrights of the work being done by Machinists, they argue at another point in their brief (p. 32) that the work stoppages had a different object, that of "breaking up" an illegal closed-shop between Westinghouse and Machinists which barred their members from employment. Assuming, contrary to the record (see R. 246-247, 140-141, 143-147, 156-157, 162, 163, 166-167, 169), that Westinghouse hired members of Machinists because of a closed-shop agreement with the latter organization or to encourage membership in it, appellants nevertheless would not be justified in their conduct. Clearly, at least *an* object of appellants' action was to force the assignment of the generator installation work to members of Millwrights rather than to members of Machinists (see R. 248-249, 246). That was enough to bring it within the proscription of Section 8 (b) (4) (D); it need not have been the sole object. This interpretation is made plain by the wording of Section 8 (b) (4) as well as by the legislative history of the section,¹⁰ and has received judicial sanction. *N. L. R. B.*

¹⁰ Senator Taft, a sponsor of the Act, explained the application of the section as follows (Daily Cong. Rec. 7001 (June 12, 1947)):

"Section 8 (b) (4), relating to illegal strikes and boycotts, was amended in conference by striking out the words 'for the purpose of' and inserting the clause 'where an object thereof is.' Obviously the intent of the conferees was to close any loophole which

v. *Wine, Liquor & Distillery Workers Union, Local 1, etc.*, 178 F. 2d 584 (C. A. 2). Moreover, the fact that Westinghouse and Machinists may have violated the Act, would not have entitled appellants also to engage in conduct proscribed by the Act. See *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261; *N. L. R. B. v. Fickett-Brown Mfg. Co.*, 140 F. 2d 883 (C. A. 5). If their contention were right and Westinghouse and Machinists had violated the Act, appellants' course was themselves to obey the provisions of the Act and call to the Board's attention by appropriate charges the transgression of the others.¹¹

Appellants also assert that the decisions of the Board in the *Pure Oil*, *Santa Ana Lumber*, *DiGiorgio Wine*, *Grauman*, and *Conway's Express* cases under Section 8 (b) (4) (A) of the Act, the secondary boycott section, cast doubt on whether a violation of Section 8 (b) (4) (D) of the Act, the jurisdictional dispute section, has actually occurred in the instant case and argue that for that reason injunctive relief should have been withheld by the court

would prevent the Board from being blocked in giving relief against such illegal activities simply because one of the purposes of such strikes might have been lawful."

¹¹ On May 9, 1949, after the initiation of the injunction proceedings in the court below, appellants for the first time filed charges with the Board alleging that Westinghouse and Machinists were engaging in violations of Section 8 (a) (3) and Section 8 (b) (2) of the Act, the sections prohibiting discrimination in regard to employment because of union membership or non-membership. On June 8, these charges were administratively dismissed for lack of evidential support, and, on appeal to the General Counsel of the Board, the dismissals were, on August 24, sustained. *Westinghouse Electric Corporation*, Case No. 21-CA-448; *International Association of Machinists*, Case No. 21-CB-156.

below (Br., pp. 32-34). These contentions are without merit. The cited cases treat with a different subsection, a finding of a violation of which requires as a prerequisite a showing of secondary as distinct from primary action. Such is not the case in respect to violations of the subsection here under review.

Appellants also refer to the Board's Section 10 (k) decision and determination in the *Ship Scaling* case, apparently implying that the dismissal of that case by the Board on the ground the dispute was over wages and not over the assignment of work indicates that the Board likewise should have dismissed this case (Br., p. 34). But the Board here, in proceedings identical to those in the *Ship Scaling* case, has determined that appellants' object in the instant case unlike the object in the *Ship Scaling* case, was to force the assignment to Millwrights of the work being done by Machinists, an object unlawful under the Act (R. 238-241).¹² The correctness of the Board's decision in this regard depends on the record in this case, not on the correctness of its findings on a different record in the *Ship Scaling* case.

Accordingly, a clear basis for granting the relief required under the Act is established unless, as appellants argue, (1) the unfair labor practices do not

¹² Appellants' suggestion (Br., p. 26) that the administrative dismissal of a charge filed under Section 8 (b) (4) (A) of the Act, the secondary boycott section, and predicated on the same incidents, is inconsistent with a finding of merit in the instant charge under Section 8 (b) (4) (D), the jurisdictional dispute section, requires only brief comment. The two sections treat with different violations; the first involves secondary action to bring about a boycott, the second involves either primary or secondary conduct to force the assignment of work to one group rather than to another. Thus, dismissal of the Section 8 (b) (4) (A) charge could not determine the validity of the Section 8 (b) (4) (D) charge.

affect commerce within the meaning of the Act, or (2) appellants' conduct is constitutionally privileged; or (3) the provisions of Section 10 (1) of the Act do not apply to violations charged under Section 8 (b) (4) (D) of the Act; or (4) the district court acted prematurely in the matter. We discuss these contentions below.

II

There is, and the district court properly found, reasonable cause to believe that the unfair labor practices with which appellants are charged affect commerce within the meaning of the Act

Appellants argue (Br., pp. 22-23, 37) that (1) the alleged unfair labor practices do not affect commerce within the meaning of the Act because the dispute arose out of a "purely local" building enterprise, and (2) the district court in concluding that there was reasonable cause to believe that the alleged unfair labor practices affected commerce disregarded the "preponderance of evidence" and merely accepted the Regional Director's judgment as to jurisdiction as a substitute for proof. These contentions are clearly without merit.

The alleged unfair labor practices directly affected the business operations of Edison, Westinghouse and Stone and Webster. The record discloses (*supra*, pp. 5-7) that during the year 1948, Edison, in the course of its business operations, purchased raw materials valued at in excess of three million dollars, of which approximately two-thirds came from sources outside the State of California. Approximately 39 percent of Edison's total output of electrical energy goes to

instrumentalities of interstate commerce and concerns engaged in interstate commerce, such as oil refineries, rubber companies, steel plants and aircraft manufacturers. During 1948, approximately 25 percent of the total power utilized by Edison originated from outside the State of California.

During 1948, Westinghouse purchased raw materials valued at in excess of two million dollars, of which approximately 50 percent originated from sources outside the State of Pennsylvania where Westinghouse is located. During the same period Westinghouse sold substantial quantities of electrical apparatus to customers located outside Pennsylvania. The three generators shipped by Westinghouse from Pennsylvania to the Redondo station in California were valued at approximately \$4,800,000.

Stone and Webster is engaged in construction activities throughout the United States and in many foreign countries. At the end of 1948 its construction work then in progress had an estimated completed value of one-third billion dollars.

Finally, of the estimated \$38,000,000 cost for constructing and equipping the Redondo station, \$12,700,000 was for equipment to be transported from outside California to the station.

Upon the foregoing facts, it is apparent that Edison, Westinghouse and Stone and Webster are engaged in interstate commerce within the coverage of the Act.¹³ The activities of appellants in calling

¹³ The Board in other proceedings before it has found that Edison and Westinghouse are engaged in commerce within the meaning of the Act. *Westinghouse Electric Corporation*, 72 N. L. R. B. 60; *Southern California Edison Co.*, 70 N. L. R. B. 80.

a work stoppage at the Redondo station plainly tended to impede and disrupt the interstate operations not only of the concerns directly involved but also of the numerous instrumentalities of interstate commerce and concerns engaged in interstate commerce which Edison supplies with electrical energy. The application of the Act to activities having, or tending to bring about, that result, no matter how "local" the project where they occur, cannot in the light of authoritative judicial pronouncements be doubted. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41-42; *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 219-222; *Polish National Alliance v. N. L. R. B.*, 322 U. S. 643, 647-648; *United Brotherhood of Carpenters and Joiners of America v. Sperry*, 170 F. 2d 863 (C. A. 10); *International Brotherhood of Electrical Workers v. N. L. R. B.*, — F. — 2d (C. A. 2), decided February 24, 1950, 25 L. R. R. M. 2449; cf. *Wickard v. Filburn*, 317 U. S. 111; *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219; *United States v. Women's Sportswear Association*, 336 U. S. 460.¹⁴ Accordingly, the court below properly concluded (R. 100) that there was reasonable cause to believe that the activities of appellants, which

¹⁴ In support of their contention that the coverage of the Act does not extend to their activities here under consideration, appellants rely solely on *Industrial Association v. United States*, 268 U. S. 64. In view of the more recent pronouncements of the Supreme Court upon the scope of Congressional regulatory power over interstate commerce, cited above, appellants' reliance upon that case must be rejected as a "reversion to conceptions formerly held but no longer effective to restrict * * * Congress' power * * *." *Mandeville Island Farms* case, *supra*, at p. 229.

presented “the threat of a strike by hundreds of persons on a construction and installation which undeniably has the character of interstate commerce, from which great harm can flow, not only to the employers, but to the community which the Edison Company serves,” affect commerce within the meaning of the Act.

III

Section 8 (b) (4) (D) and the order of the court below based thereon do not invade any constitutional rights of appellants

Appellants assert (Br., p. 10) that if Section 8 (b) (4) (D) enjoins a union and its members from striking to win from rival union or from nonunion employees contested work opportunities or from refusing to perform services for the employer in that situation, then the section is repugnant to the First, Fifth and Thirteenth Amendments of the Constitution.

The claim that Section 8 (b) (4) (D) and the order of the court below subjects workers to involuntary servitude prohibited by the Thirteenth Amendment is, as this Court has observed with respect to Section 8 (b) (4) (A), “patently groundless.” *Printing Specialties and Paper Converters Union, Local 388, A. F. L. v. LeBaron*, 171 F. 2d 331. Accord: *N. L. R. B. v. Wine, Liquor & Distillery Workers Union, Local 1, etc.*, 178 F. 2d 584 (C. A. 2); *N. L. R. B. v. Local 74, United Brotherhood of Carpenters and Joiners of America*, — F. 2d — (C. A. 6), decided April 4, 1950.

Neither the Act nor the order of the court below prohibits employees from ceasing to work for any reason. Indeed, the statute expressly states that nothing in it shall be construed to require an individ-

ual employee to work without his consent or to enjoin him from quitting his employment.¹⁵ The prohibition contained in Section 8 (b) (4) (D) is aimed at labor organizations and makes it an unfair labor practice for a labor organization or its agents to engage in the proscribed conduct. Accordingly, it must be said here, as the Supreme Court said of a contention similar to that advanced by appellants, "The facts afford no foundation for the contention that any action of the State has the purpose or effect of imposing any form of involuntary servitude." *International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board*, 336 U. S. 245, 251.

The contention urged by appellants that Section 8 (b) (4) (D) insofar as it enjoins strikes for the stated objective or picketing to induce concerted stoppages of work for that objective such as occurred here invades the freedom of speech and assemblage guaranteed by the First Amendment cannot be reconciled with controlling decisions. The statute, as this Court has observed, "broadly sweeps within its prohibition an entire pattern of industrial warfare

¹⁵ Section 502 of the Act provides:

"Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

deemed by Congress to be harmful to the public interest." *Printing Specialties* case, *supra*, at p. 334. The authority of Congress to mark the limits of tolerable industrial conflict in the public interest and, in order to effectuate that purpose, to regulate and curtail the right to strike or to picket peacefully cannot be seriously challenged. In *International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board*, 336 U. S. 245, the Supreme Court reaffirmed the principle that the right to strike enjoys no absolute constitutional protection and because of its serious impact upon the public interest is "vulnerable to regulation" when that interest requires limitation of the area of permissible industrial conflict. Accord: *N. L. R. B. v. Wine, Liquor and Distillery Workers Union, Local 1, etc.*, 178 F. 2d 584 (C. A. 2); *N. L. R. B. v. Local 74, United Brotherhood of Carpenters and Joiners of America*, — F. 2d — (C. A. 6), decided April 4, 1950. In *Giboney v. Empire Storage and Ice Company*, 336 U. S. 490, the Supreme Court declared that the Constitution has not so greatly impaired the Nation's power to govern that it could not, in order to keep the channels of trade wholly free and open, set the limits of permissible contest open to industrial combatants and, in order to achieve that purpose, place restrictions upon peaceful picketing. Accord: *International Brotherhood of Electrical Workers v. N. L. R. B.*, — F. 2d — (C. A. 2), decided February 24, 1950, 25 L. R. R. M. 2449. In the light of these authorities we believe that Congress may, to protect the public interest, prohibit as it has in Section 8 (b) (4) (D) the conscription of employees by unions to force an employer to yield to

union demands for the assignment of work as between two rival labor organizations.

Appellants' further contention, that Section 8 (b) (4) (D) in conjunction with Section 10 (k) of the Act is invalid because, they assert, it curtails the liberty of contract guaranteed by the Fifth Amendment, must also be rejected. It is difficult to perceive how the Act interferes with this freedom; the statute simply prohibits strikes and the inducement of strikes in support of jurisdictional disputes as defined in the Act. But, in any event, the argument rests upon a conception of the due process clause which the Supreme Court, in its own words, has "deliberately discarded." In *Lincoln Federal Labor Union v. Northwestern Iron and Metal Company*, 335 U. S. 525, the petitioner union urged upon the court the proposition that state prohibitions against closed-shop contracts were violative of due process in that they restricted freedom of contract. In support of this contention the union cited various cases, including *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, upon which appellants here rely. The Court, after declaring that these cases represented a "due process philosophy that has been deliberately discarded," said (at p. 536):

* * * This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what

are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See *Nebbia v. New York*, *supra* at 523–524, and *West Coast Hotel Co. v. Parrish*, *supra* at 392–395, and cases cited. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

IV

The provisions of Section 10 (1) of the Act properly were construed to apply to the charges under Section 8 (b) (4) (D) of the Act herein; the district court did not prematurely enter the injunction or consider matters not properly before it

Appellants argue (Br., p. 27) that by making Section 10 (1) of the Act apply to charges under clause (D) of Section 8 (b) (4) of the Act separately from the other clauses of the section and when “appropriate” (see *supra*, pp. 15–16), Congress intended a different standard of proof to be required by the courts in granting injunctive relief in respect to cases under the latter clause of Section 8 (b) (4) than in respect to charges under clauses (A), (B), and (C) of

¹⁶ As already stated (pp. 15–16), Section 10 (1) after providing that it shall be mandatory for the Board’s representative to apply to the appropriate district court for injunctive relief whenever a preliminary investigation discloses that a complaint should issue on charges under clauses (A), (B), and (C) of Section 8

the section.¹⁶ Appellants concede that reasonable cause to believe that the violation charged has occurred is sufficient to warrant Section 10 (1) injunctive relief in respect to cases under clauses (A), (B), and (C) of Section 8 (b) (4). However, they argue, without citing judicial or legislative precedent, that in specifying that the provisions of Section 10 (1) shall apply to charges under clause (D) of Section 8 (b) (4) "in situations where such relief is appropriate," Congress intended the courts to grant injunctive relief in cases arising under that clause only when it is shown by a *preponderance* of the evidence that the misconduct charged has occurred, that it affects commerce within the meaning of the Act, that there is no adequate remedy at law, and that great and irreparable injury is threatened (Br., p. 27). Such a construction of the application of Section 10 (1) to Section 8 (b) (4) (D) cases disregards traditional equity standards for granting statutory interlocutory injunctive relief (see *supra*, pp. 14-17), the plain meaning of the words in Section 10 (1), and the legislative history of the section.

Congress, in Section 10 (1), made it mandatory on the Board in the public interest to seek injunctive relief in respect to all charges under clauses (A), (B), and (C) of Section 8 (b) (4) believed after investigations to have merit and to warrant the issuance of a complaint. However, in respect to Section 8 (b) (4) (D) charges, Congress desired to grant the Board

(b) (4), and specifying procedures to be followed in connection with such application, provides in the last sentence that when such relief is "appropriate" the procedures of the section "shall apply" to charges under clause (D) of Section 8 (b) (4).

discretion to decide when an application for injunctive relief is appropriate to effectuate the statutory scheme and the public policy. This is made clear in the Senate Report on this provision in Section 10 (1).¹⁷ As stated in the report:

Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under the present act the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.

In subsections (j) and (l) to section 10 the Board is given additional authority to seek injunctive relief. * * *

Section 10 (l) makes it mandatory upon the Board to petition for injunctive relief in the case of strikes or boycotts that are alleged to constitute unfair labor practices within the meaning of paragraphs (A), (B), and (C) of section 8 (b) (4). * * * *In the case of strikes and boycotts involving jurisdictional disputes, the same procedure may be used if appropriate; injunctive relief in such cases is*

¹⁷ S. Rep. No. 105, 80th Cong., 1st Sess., p. 27.

made discretionary because it is anticipated that the separate machinery provided in section 10 (k) for settling such disputes will generally suffice. [Emphasis added.]

Clearly, under the circumstances of the instant case injunctive relief was appropriate and in accord with the statutory scheme, as the district court found (R. 91-95, 99-100). Appellants pulled 650 workers off the job in support of their claim to the work of the two Machinists; brought construction operations at the Redondo station to a practical standstill for a period of over a week; and threatened seriously to disrupt the interstate business of Edison, Westinghouse, and Stone and Webster. Thereafter, they refused to relinquish their claim to the disputed work notwithstanding the Board's determination that their demands were unlawful and continued to threaten to engage in further strike action and to disrupt the businesses of Edison, Westinghouse, and Stone and Webster if Westinghouse gave effect to the Board's determination and restored the two Machinists to work. Unquestionably the court below in the "balancing of interests" properly concluded (R. 99-100) that, in order to avoid "great harm" to the "employers" and "to the community which the Edison Company serves," injunctive relief was appropriate and in the public interest. In proceedings like these the propriety of injunctive relief turns not upon traditional equity criteria applicable in suits between private parties, but upon the necessity for effectuating the statutory policy. *Hecht Co. v. Bowles*, 321 U. S. 321, 331. It is well settled that where Congress

sets the standards for the issuance of injunctions, those standards, and no others, need be satisfied to obtain injunctive relief. *S. E. C. v. Jones*, 85 F. 2d 17 (C. A. 2); *S. E. C. v. Torr*, 87 F. 2d 446 (C. A. 2); *American Fruit Growers v. United States*, 105 F. 2d 722 (C. A. 9); *United States v. Adler's Creamery, Inc.*, 110 F. 2d 482 (C. A. 2); *Douds v. Teamsters Union, Local 294*, 75 F. Supp. 414, 417-418 (D. C. N. D. N. Y.); *Evans v. International Typographical Union*, 76 F. Supp. 881, 885 (D. C. S. D. Ind.).

Appellants further contend (Br., p. 28) that the district court erred in entertaining the petition for injunctive relief under Section 10 (l) prior to the expiration of the 10 days specified in the Board's decision for compliance with its Section 10 (k) determination of the dispute (see R. 241), since, under Section 10 (k), compliance with the Board's determination would terminate the matter before the Board (see *supra*, p. 4). However, as the court below noted (R. 95), and the only court of appeals to consider the matter agrees (see *Herzog v. Parsons*, — F. 2d — (C. A. D. C.), decided February 20, 1950, 25 L. R. R. M. 2413), the provisions of Section 10 (k) present no impediment to the pressing of a Section 10 (1) injunction proceeding before a district court concurrently with the processing of a Section 10 (k) proceeding before the Board; the court proceeding as well as the Board proceeding can be terminated upon compliance with the Board's determination or a voluntary settlement of the dispute. In any event, appellants cannot claim that they were in any respect

prejudiced in the instant case. As appellants concede (Br., p. 28) and the court's opinion discloses (R. 95-96), the district court delayed decision in the matter until the 10-day period for compliance with the Board's determination had expired.

Nor did the court below err in considering appellants' manifested intent to continue the unlawful exertion of pressure on Westinghouse to compel the assignment of the disputed work to Millwrights evinced by the work stoppage of April 11, 1949 (see *supra*, p. 9). Evidence of that stoppage was admissible even though it occurred after the Section 10 (k) hearing before the Board. As stated above, a Section 10 (k) hearing and determination by the Board is not a prerequisite to a court proceeding under Section 10 (l). Moreover, the April 11 work stoppage and the February 2 strike (see *supra*, pp. 8-9) were over the same disputed work, the installation of generators, not over different work assignments each, requiring a Section 10 (k) proceeding. Accordingly, it was proper for the court to consider the most recent evidence of appellants' unlawful conduct in the Section 10 (l) proceeding below, as the Board may likewise do in its complaint case. See *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350.

V

The injunction order entered by the court below is proper and valid

Appellants assert (Br., pp. 29-32, 34) that the order of the court below insofar as it enjoins them from "inducing or encouraging" the employees of

the named employers to engage in a strike for the prohibited objective is so vague and indefinite that it is impossible to ascertain what conduct is allowed or forbidden and is therefore invalid. The order is phrased in the language of the Act. This Court has previously rejected an attack upon that language based on the claim that it was void because of vagueness and uncertainty and held that the words induce and encourage are "sufficiently clear to enable the Board and the courts to administer it." Accord: *N. L. R. B. v. Wine, Liquor and Distillery Workers Union, Local 1, etc.*, 178 F. 2d 584 (C. A. 2). The language of Section 8 (b) (4) (D) and the order of the court below are as specific as the nature of the problem permits and as is reasonably practicable to effectuate the congressional intent. The courts under the Act have, for example, repeatedly enforced orders which enjoin employers from restraining, coercing or interfering with employees in the exercise of their rights under the Act. Surely, the words "induce or encourage" viewed against the purpose of the statute afford as practicable and feasible a guide to appellants as the words "restrain, interfere with and coerce" afford. Cf. *Hague v. C. I. O.*, 307 U.S. 496, 517.

Respondents further claim that the court below erred in failing to qualify the injunction in the terms of Section 8 (c) of the Act. Section 8 (c) of the Act, literally read, exempts from the unfair labor practice provisions of the Act the expression of views, arguments or opinion if such expression contains no

threat of reprisal or force or promise of benefit.¹⁸ However, this Court, the Second Circuit Court of Appeals, the Tenth Circuit Court of Appeals and the Board have held, on different reasoning, that Section 8 (c) does not protect the type of activities here under consideration. *Printing Specialties and Paper Converters Union, Local 388, A. F. L. v. LeBaron*, 171 F. 2d 331 (C. A. 9); *United Brotherhood of Carpenters and Joiners of America v. Sperry*, 170 F. 2d 863 (C. A. 10); *International Brotherhood of Electrical Workers v. N. L. R. B.*, — F. 2d (C. A. 2), decided February 24, 1950, 25 L. R. R. M. 2449; *United Brotherhood of Carpenters and Joiners of America*, 81 N. L. R. B. 802.

Appellants also argue (Br., p. 38) that the injunction is improper because it is not limited to appropriate *pendente lite* relief, but for all practical purposes finally determines the issues presented in the charge. This is so, appellants assert, because during the pendency of the injunction and under its protection the project where the dispute arose will in all likelihood be completed with the result that by the time the Board can decide the merits of the charge the dispute will have become moot. Congress undoubtedly was aware that the injunctive relief afforded by Section 10 (1) would in some instances have the result of which appellants complain. Against this Congress weighed

¹⁸ Section 8 (c) provides that:

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

the necessity in respect to certain types of unfair labor practices for guarding against substantial and serious injury to the public interest and for promptly eliminating undesirable obstructions to the free flow of commerce. Congress felt that the relatively slow procedures of Board hearing and order were inadequate to achieve that result and, accordingly, provided for interim injunctive relief. Although from a practical standpoint such injunctive relief might in certain circumstances render a controversy moot by the time the Board handed down its decision, Congress concluded that on balance the public interest nevertheless required speedy injunctive relief where there was a reasonable probability that certain types of unfair labor practices were being committed. S. Rep. No. 105, 80th Cong., 1st Sess., pp. 8, 27.

CONCLUSION

It is respectfully submitted that the order of the court below is proper and valid in all respects and that it should be affirmed.

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APRIL 1950.



No. 12,378

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, and its Agent, Lloyd A. Mashburn; MILL-WRIGHT AND MACHINERY ERECTORS, LOCAL 1607, of the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L., and its Agent HERMAN BARBAGLIA,

Appellants,

vs.

HOWARD F. LEBARON, REGIONAL DIRECTOR OF THE TWENTY-FIRST REGION OF THE NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Appellee.

APPELLANTS' PETITION FOR REHEARING.

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Appellee.

APPELLANTS' PETITION FOR REHEARING.

Comes now Los Angeles Building and Construction Trades Council, and its Agent Lloyd A. Mashburn; Millwright and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A. F. L., and its Agent Herman Barbaglia, appellants in the above entitled matter and respectfully petitions the Court to set aside its opinion heretofore issued on December 8,

1950, and to grant a new hearing in this matter and as reasons therefore respectfully show:

I.

That the aforementioned opinion, issued December 8, 1950, by the Court *en banc*, declined to sustain the appeal of appellants to set aside a decree of the United States District Court for the Southern District of California entered on the 8th day of June, 1949, in which the above named appellants had been erroneously enjoined under a purported Statute of the United States, namely, the National Labor Relations Act, as amended (Public Law 101, 80th Congress), which statute as applied to appellants and is in and of itself unconstitutional and void.

II.

The Court in disposing of the appeal herein relied exclusively upon the following decisions as conclusive authority to affirm the decree of the lower court. (*Printing Specialties and Paper Convertors' Union v. Le Baron*, 171 F. 2d 331; *Building & Construction Trades Council v. Le Baron*, 181 F. 2d 449; *Hughes v. Superior Court*, 339 U. S. 460; *Teamsters' Union v. Hanke*, 339 U. S. 470; and *Building Service Union v. Gazzam*, 339 U. S. 532.)

In doing so, the Court has misapplied these decisions. The purport of all of these decisions has only to do with the right, under a public policy of a sovereign, to restrict certain *picketing activities*, or rather to curtail them under certain circumstances. In reaching the above decisions, the Supreme Court of the United States was careful to observe the dual nature of picketing as a means of conveying information and a means of "economic compulsion." It was the abuses of the constitutional rights to picket which the Court condemned and not the right to communication.

But the important considerations of those cases are inapposite here. *In the instant matter there was no picketing.* By relying, solely, upon these cases, the Court denies to appellants the constitutional guaranty of freedom of communication which does not involve acts coupled with "economic pressure." Rather, the instant matter deals solely with *the rights of employees to give or withhold their personal services*, depending upon the conditions of work, wages, etc.

III.

The Court seems to have given no consideration to the fact that the statute and the decree (which merely parrots the language of Section 8(b)(4)(D) of the statute) forecloses the acknowledged right of freedom of communication between members of these unions, in their homes, union halls, on the streets, or wherever they may gather to discuss their ideas, problems and opinions. The long arm of the court, through its injunctive action, has closed the mouths of these interested citizens or has made it impossible or unsafe for each of them to give vent and voice to their own ideas about the conditions under which they will be willing to work.

In choosing to follow the above mentioned cases, the court seems to have ignored, completely, the long line of cases in which the Supreme Court has carefully preserved the constitutional right of freedom of expression. Much of the law proclaimed by these cases has been precipitated in defiance of regulatory statutes, such as the one under consideration here. Beginning with *Lovell v. Griffin*, 303 U. S. 444, in the spring of 1938, this defiance has occasioned no less than thirty-four cases, leading to eighteen

decisions by the Supreme Court.¹ These cases involved primarily the constitutional immunities of religious activities. However, freedom of speech was inextricably interwoven into all of them as a result of the constitutional doctrine developed.

The position taken in these cases is that all the First Amendment rights are to be grouped from the standpoint of the extent of constitutional protection granted them against interference through regulatory laws. This principle is explicitly stated in *Prince v. Massachusetts*, *supra*, the court saying:

“All are interwoven there together. Differences there are, in them and the modes appropriate for their exercise. But they have unity in the charter’s prime place because they have unity in their human sources and functionings. . . . But in everyday business of living, secular or otherwise these variant aspects of personality find inseparable expression in a thousand ways. *They cannot be altogether parted in law more than in life.*” (Emphasis added.)

A number of specific rules of constitutional consideration have been developed in these cases. Thus, the mere inconvenience of the public from the attempts at communication furnishes no reason for the suppression of communication. (*Schneider v. California*, *supra*.) Proprietary inter-

¹*Prince v. Massachusetts*, 321 U. S. 158; *Lovell v. Griffin*, *supra*; *Sartin v. Struthers*, 319 U. S. 141; *Schneider v. California*, 308 U. S. 147; *Jones v. Opelika*, 319 U. S. 103; *Cantwell v. Connecticut*, 310 U. S. 296; *Minersville Dist. v. Gobitis*, 310 U. S. 586; *Cox v. New Hampshire*, 312 U. S. 569; *Jamison v. Texas*, 318 U. S. 413; *Murdock v. Pennsylvania*, 319 U. S. 106; *Douglas v. Jeannette*, 319 U. S. 157; *Taylor v. Mississippi*, 319 U. S. 583; *Bd. of Education v. Barnette*, 319 U. S. 624; *Marsh v. Alabama*, 326 U. S. 501; *Tucker v. Texas*, 326 U. S. 517.

ests afford no right to intrude upon rights protected by the First Amendment. (*Marsh v. Alabama, supra.*) The annoyance implicit in the orderly and peaceful exercise of the above protected rights must be accepted as a part of the price we pay for freedom and the fact that the choice of the place for the distribution of ideas may cause civic inconvenience is not enough to justify the deprivation of those rights. (*Schneider v. California, supra.*) Even the ringing of door bells and solicitations at private homes are protected under the free speech Amendment. (*Martin v. Struthers*, 319 U. S. 141.)

When the basic doctrines of these cases are brought to bear upon the broad restraints of the statute and the decree, it appears that neither the statute nor the decree can stand for unquestionably they restrain and are designed to restrain and prohibit any form of communication between union members which may have the possible effect of persuading other members to withhold their services in the interests of the membership as a whole. Indubitably, any discussion of ideas pertaining to the withholding of services, which is taken up as a union matter, in the confines of the union hall, if they have the effect of influencing any of those present to join with their fellows to refuse to work under conditions abhorrent to them is restrained and enjoined by the decree and the statute under penalty of contempt. The founding fathers never intended the exercise of free speech to be burdened in such a manner or to such an extent. "*The right thus to discuss and inform people concerning the advantages of unions and joining them is protected not only as a part of free speech, but as part of free assembly.*" *Thomas v. Collins*, 323 U. S. 516. (Emphasis added.) The restrictions placed by the statute and the decree upon the "free trade of ideas"

flouts the immunities of the constitutional privileges. The deprivation of the right to persuade to action likewise affronts the constitutional protections of freedom of expression. "Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and *to preserving the right to urge it that the protections are given.*" *Thomas v. Collins, supra.* Plainly, the design of the statute and decree is to repress action of union members who, believing the conditions of work undesirable or unconscionable, elect not to work under those conditions and to withdraw their skills until more desirable conditions are obtained. The destruction of these rights by the statute and the decree cannot be justified when the plain purport of the First Amendment is brought into focus.

"We should be eternally vigilant against attempts to check expressions of opinions . . . unless they so imminently threaten . . . that an immediate check is required to save the country." (Mr. Justice Holmes in *Abrams v. U. S.*, 250 U. S. 616 at 630.)

IV.

The likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or of the press. Even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. (*Bridges v. California*, 314 U. S. 252; *Schneider v. Irvington*, 308 U. S. 147.) Thus the mere declaration by the congress does not in and of itself become enough to deprive of liberty of free speech but as Mr. Justice Holmes states, must be of such a stature

that failure to stem it will destroy our country. These two cases, cogently discusses the so-called "clear and present danger" doctrines and that to warrant suppression of speech, assembly and action the situation covered must be extremely serious. This phase is discussed by the Supreme Court in the *Bridges* case as follows:

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be *extremely serious* and the degree of imminence extremely high before utterances can be punished. These cases do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum of compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It *prohibits any law 'abridging the freedom of speech or of the press'*. It must be taken as a *command* of the *broadest* scope that explicit language, read in a context of a liberty-loving society, will allow." (Emphasis added.)

V.

The heavier demands of the Due Process clause of the Fifth Amendment when read in context with the First Amendment has been extended and clarified in this last decade. The special sanctity of the First Amendment liberties as compared with other constitutional liberties has been undebatable since the establishment of the "clear and present danger" rule in *Schenk v. U. S.*, 249 U. S. 47 at 52, and it has been strengthened by every First Amendment case since that time. This substantial clarification of this special sanctity was made in the *Bridges* decisions, *supra*, and has been reiterated by the Supreme Court in *Pennekamp v. Florida*, 328 U. S. 331, and *Craig v. Harney*,

331 U. S. 367. The demands of the constitutional due process, when coupled with free speech questions are considerably more exacting. What suffices in other situations does not suffice when the precious freedoms of the First Amendment are involved. "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. . . ." *Thomas v. Collins, supra*.

In *Board of Education v. Barnette*, 319 U. S. 624, Mr. Justice Jackson speaking for the court says:

"In weighing arguments of the parties it is important to distinguish between the due process clause of the fourteenth amendment as an instrument for transmitting the principle of the first amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the principles of the first, is much more definite than the test when only the fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the first becomes its standard. The right to regulate, for example, a public utility may well include, so far as due process is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedom of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the fourteenth amendment which bears directly upon the state it is the more specific limiting principles of the first amendment that finally governs the case." (At 639.)

When the substance of this reasoning is read into the facts of this case, the provision of Section 10(k) of the act glaringly becomes violative of the due process required. That it is a system of compulsory arbitration is conclusively apparent. More, it deprives, arbitrarily, the freedom of discussion of members of a union who find that there are extant, circumstances detrimental to their interests or constitute conditions of work under which they are not willing to perform their skills.

“Whatever occasion would restrain orderly discussion and persuasion . . . must have clear support in public danger. Only gravest abuses, endangering paramount interests, give occasion for permissible limitation.” *Thomas v. Collins, supra*.

VI.

The Labor Management Relations Act of 1947, *supra*, like its predecessor, the National Labor Relations Act, found its basic constitutional support under the Commerce clause of the Constitution. (*Jones and Laughlin v. N. L. R. B.*, 301 U. S. 1.) That clause was a part of the established constitution. The Bill of Rights, on the other hand was required by the people before they would consent to the adoption of the original document. The Bill of Rights was insisted upon because the people were afraid, that without the restrictive provisions of the Bill of Rights upon those chosen to administer and legislate under the constitution, those sacred rights would be frittered away by legislatures from political or selfish motives. The history of the Bill of Rights reveals an intent by the people not to surrender those rights to the government in the exercise of the original seven Articles. Thus, while the power of congress to regulate commerce among the several states was granted by the states to the federal government by *Article*

I, Section 8, the states and the people did not grant but expressly withheld from the congress, while in the regulation of commerce, the power to abridge freedom of speech and assembly. The likelihood of such an attempt, under the guise of the commerce power, was intentionally checkmated. Thus, while the power to regulate commerce is a broad one, its exercise cannot be an excuse for the deprivations of the freedoms so carefully safeguarded by the states and the people.

Therefore, congress, under its commerce powers, cannot deprive appellants, their agents and members from the freedom of expression, of the "trade of ideas" and the right to "persuade to action." It cannot invade the thoughts and minds of union members and restrict or prohibit those thoughts or mental operations. Congress cannot, under the guise of commerce regulation, deprive discussion among union members, or any others, of the conditions under which they will consent to work or the extent they will adhere one to the other to gain for their collective or individual interests advantages of better living or conditions of work or of wages.

VII.

Wherefore, appellants pray that the opinion of the court *en banc* be set aside, that the Court grant a further hearing in the matter and for such other and proper relief as to the court seems just and proper.

Respectfully submitted,

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Certificate of Counsel.

James M. Nicoson respectfully certifies that he is one of the attorneys for appellants herein, that in his judgment the aforementioned Petition for Rehearing is well founded and that it is not proposed for the purpose of delay.

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